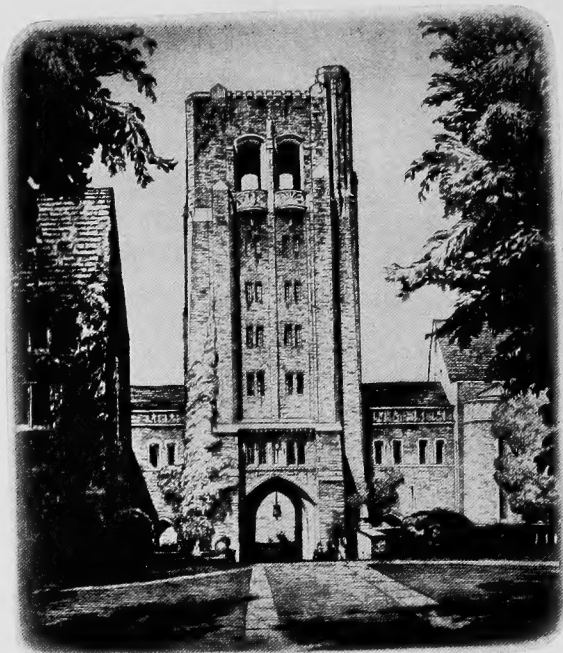


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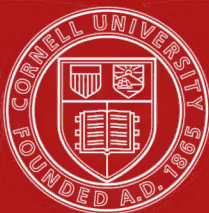
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THE
GENERAL LAW
OF
SURETYSHIP

INCLUDING COMMERCIAL
AND
NON-COMMERCIAL GUARANTEES
AND
COMPENSATED CORPORATE SURETYSHIP

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PREFACE.

The purpose of this work is to state in a single volume the law of guaranty and suretyship, both generally and in its most important and practical details, but divested of all collateral discussion so far as is consistent with an intelligible presentation of the main subject. The subject is an intricate one, for, unlike most other forms of contract, suretyship never involves less than three parties. Furthermore, unlike the general law of contract, the law of the subject is not a mere outgrowth of the common law, but has, in many of its most important phases, developed upon the chancery side of the courts, particularly with respect to the doctrines of exoneration, contribution and subrogation, and in some important aspects it closely touches or directly involves the law merchant.

No attempt has been made to entirely exhaust the authorities, nor would any good purpose be subserved thereby. Merely cumulative citation upon uncontroverted points has therefore been avoided, but sufficient reference has been made to show generally the development and important applications of settled principles. At the same time practically all the cases that have been printed as leading in the case books for student's use and in miscellaneous collections have been cited in their appropriate places, and where important conflicts of authority exist, effort has been made to indicate them and to reconcile such differences as seem apparent rather than real.

The contracts of incorporated surety companies partake of the nature both of insurance and of suretyship. For this reason, and for the reason that the corporate

compensated surety is largely superseding the private surety, particularly on official bonds, the judicial and administrative proceedings, and to a considerable extent in the case of private officers, agents and other fiduciaries, a statement of the fundamental legal principles and general practice of this form of assurance has seemed indispensable. This matter, however, has not been relegated to a separate chapter but has been discussed in connection with cognate topics in the general law of private suretyship with which the rules of corporate compensated suretyship have been frequently contrasted.

Some difficulty has been experienced in determining how to treat those forms of suretyship peculiar to the law merchant. So far as the suretyship principles applicable to them are not peculiar to that law, they have been more or less discussed throughout the book, and a general statement of the doctrines peculiar to them or variant from those of the general law of suretyship has been made in separate sections on the contracts of indorsers and accommodation parties, and incidentally in other connections where they could be conveniently contrasted with the rules of ordinary suretyship.

The author is particularly indebted to the exhaustive, able and much cited work of Mr. George W. Brandt on Suretyship and Guaranty, to the third edition of which frequent reference has been made.

EDWARD W. SPENCER.

Oct. 1, 1913.

CONTENTS.

References are to Sections.

CHAPTER I.

INTRODUCTORY

SURETYSHIP IN GENERAL

DEFINITIONS AND GENERAL CHARACTERISTICS.

	SEC.
OF SURETYSHIP IN GENERAL—REAL AND PERSONAL SURETYSHIP DISTINGUISHED.....	1
SURETYSHIP RELATION MAY BE SHOWN BY PAROL.....	2
SURETYSHIP IN ITS NARROWER OR SPECIFIC SENSE—DISTINGUISHED FROM GUARANTY.....	3
CONTRACT OF INDORSER DISTINGUISHED FROM SURETYSHIP AND GUARANTY.....	4
ACCOMMODATION PARTIES TO COMMERCIAL PAPER.....	5
SAME—CONTRACTS OF ANOMALOUS OR IRREGULAR INDORSER.....	6
SURETYSHIP OR INSURANCE—COMPENSATED CORPORATE SURETYSHIP WHERE SURETYSHIP RELATION UNKNOWN TO CREDITOR AT TIME OF CONTRACTING OR ARISES SUBSEQUENTLY—ASSUMPTION BY PARTNER OF FIRM DEBTS.....	8
REAL SURETYSHIP—MORTGAGE OR PLEDGE TO SECURE ANOTHER'S DEBT—WIFE'S MORTGAGE FOR HUSBAND'S DEBT.....	9
SURETYSHIP BY ASSUMPTION OF MORTGAGE DEBT.....	10
ASSIGNOR OF LEASE AS SURETY.....	11
STOCKHOLDERS' IN CORPORATIONS AS SURETIES WITH RESPECT TO STATUTORY LIABILITY.....	12
CO-DEBTORS AS SURETIES.....	13

CHAPTER II.

OF THE CONSIDERATION FOR THE SURETYSHIP UNDERTAKING

	SEC.
IN GENERAL—SURETYSHIP BY SPECIALTY.....	14
WHEN CONSIDERATION FOR PRINCIPAL'S UNDERTAKING SUPPORTS THAT OF SURETY OR GUARANTOR.....	15
SAME—PAST CONSIDERATION—SURETY FOR OBLIGATION PREVIOUSLY CONTRACTED.....	16
SAME—EXTENSION OF TIME OR FORBEARANCE IN FAVOR OF PRINCIPAL ABANDONMENT OF RIGHTS.....	17
SAME—VOLUNTARY FORBEARANCE AGAINST PRINCIPAL INSUFFICIENT.....	18
FAILURE OF CONSIDERATION—CONDITIONS PRECEDENT.....	19

CHAPTER III.

INCAPACITY OF PARTIES AS AFFECTING THE CONTRACT OF GUARANTY
OR SURETYSHIP

	SEC.
INCAPACITY OF PRINCIPAL.....	20
INCAPACITY OF SURETY OR GUARANTOR—COVERTURE.....	21
SAME—INFANCY.....	22
SAME—PERSONS FORBIDDEN TO BECOME SURETIES BY STATUTES....	23
SAME—LUNACY OF SURETY OR GUARANTOR.....	24
SAME—ULTRA VIRES CONTRACT OF CORPORATE PRINCIPAL.....	25
PRIVATE CORPORATIONS AS GUARANTORS OR SURETIES.....	26
SAME—INCORPORATED SURETY COMPANIES.....	27
SURETY TO CORPORATION IN ULTRA VIRES TRANSACTION.....	28
PARTNERS AND PARTNERSHIPS AS SURETIES.....	29
CONTRACTS OF GUARANTY AND SURETYSHIP THROUGH THE INTERVEN- TION OF AGENTS.....	30

CHAPTER IV

OFFER OF GUARANTY, ITS ACCEPTANCE AND NOTICE THEREOF

	SEC.
IN GENERAL.....	31
GUARANTOR SIGNING AT REQUEST OF CREDITOR.....	32
DISTINCT AND VALUABLE CONSIDERATION MOVING FROM CREDITOR TO GUARANTOR.....	33
GUARANTEE OF SUBSISTING OR CONTEMPORANEOUS OBLIGATION....	34
GUARANTEE BY SPECIALTY—JOINT PROMISE.....	35
OFFER OF GUARANTY—FUTURE ADVANCES—PROBLEM STATED.....	36
SAME—THE ENGLISH RULE.....	37
THE FEDERAL OR AMERICAN RULE.....	38
SAME—ABSOLUTE GUARANTY OF DEFINITE OBLIGATION—NOTICE OR WAIVER THEREOF IMPLIED.....	39
STIPULATION FOR NOTICE.....	40
NOTICE TO GUARANTOR OF AMOUNT DUE UNDER GUARANTY.....	41
FORM AND SUFFICIENCY OF NOTICE—PLEADING.....	42
WAIVER—NEW PROMISE OR PART PAYMENT.....	43

CHAPTER V

PRINCIPAL OR SURETY COMPETENT BUT NOT BOUND. CONDITIONAL
EXECUTION AND UNAUTHORIZED DELIVERY—FRAUD, DURESS,
ILLEGALITY AND OTHER MATTERS AFFECTING ASSENT AND
EXECUTION—ESTOPPEL OF SURETIES

EXECUTION OF CONTRACT—CONCEALMENT, MISREPRESENTATION AND
WARRANTIES IN CORPORATE SURETY BONDS

	SEC.
EXECUTION OF CONTRACT IN GENERAL—CONDITIONS—DELIVERY BY AGENT.....	44
FAILURE OF PRINCIPAL OR CO-SURETY TO EXECUTE CONTRACT.....	45
OTHER CONDITIONS—BONA FIDE PAYEES AND PURCHASERS.....	46

	SEC.
SAME—CONTRACT EXECUTED IN BLANK.....	47
WHERE CONTRACT OF SURETY, PRINCIPAL OR CO-SURETIES FORGED	48
ESTOPPEL OR PRECLUSION OF SURETY TO QUESTION VALIDITY OF PRINCIPAL'S CONTRACT OR HIS OWN LIABILITY.....	49
WAIVER AND ESTOPPEL AS APPLIED TO CORPORATE SURETY BONDS	50
FRAUD OF CREDITOR UPON SURETY.....	51
SAME—CONCEALMENT, MISEPRESENTATION AND WARRANTY AS AFFECTING SURETY BONDS.....	52
SAME—STATEMENTS OR REPRESENTATIONS AMOUNTING TO WAR- RANTIES OR CONDITIONS OF THE CONTRACT—POWER OF OFFI- CER OR AGENT OF CORPORATE OBLIGEE TO MAKE.....	53
CONSTRUCTION OF WARRANTIES AND CONDITIONS IN CORPORATE SURETY BONDS.....	54
FRAUD PRACTICED BY THE PRINCIPAL OR A STRANGER UPON THE SURETY.....	55
FRAUD BY CREDITOR OR OBLIGEE UPON PRINCIPAL.....	56
DURESS AS AFFECTING LIABILITY OF SURETIES.....	57
ILLEGALITY AS AFFECTING THE LIABILITY OF SURETIES.....	58

CHAPTER VI

LEGAL REQUIREMENTS AS TO FORM—NECESSITY FOR WRITING—STATUTE
OF FRAUDS

	SEC.
REQUIREMENTS AS TO FORM—IN GENERAL—STATUTE OF FRAUDS...	59
CONSTRUCTION OF THE STATUTE—ITS GENERAL EFFECT.....	60
SAME—PROMISE "DIRECT" OR "ORIGINAL," OR "COLLATERAL"— TERMS DISTINGUISHED.....	61
"NO ACTION SHALL BE BROUGHT"—PLEADING THE STATUTE.....	62
THE SPECIAL PROMISE.....	63
"DEBT, DEFAULT OR MISCARRIAGE".....	64
"OF ANOTHER PERSON".....	65
SAME—WHERE PRINCIPAL INCOMPETENT OR NOT BOUND.....	66
SAME—JOINT PROMISORS.....	67
SAME—DEBT OR OBLIGATION NOVATED OR OTHERWISE DISCHARGED..	68
WHERE ORIGINAL DEBTORS REMAIN BOUND—SAME—NEW CON- SIDERATION MOVING TO GUARANTOR OR SURETY "MAIN PUR- POSE RULE".....	69
SAME—ORAL CONTRACT OF SURETY COMPANY.....	70
SAME—INDIRECT, REMOTE OR INCIDENTAL BENEFIT TO GUARANTOR OR SURETY.....	71
SAME—MUST THE CONSIDERATION MOVE FROM PROMISEE?.....	72
APPLICATION OF THE MAIN PURPOSE RULE— ORAL GUARANTY IN SALE OR TRANSFER OF SECURITIES.....	73
SAME—GUARANTY IN CONSIDERATION OF RELEASE OR TRANSFER OF LIEN OR INCUMBRANCE ON GUARANTOR'S PROPERTY.....	74
ARE CONTRACTS OF INDEMNIFY WITHIN THE STATUTE?.....	75
SAME—PROMISE OF DEL CREDERE AGENT.....	76

	SEC.
PROMISE DIRECTLY TO DEBTOR TO PAY HIS DEBT.....	77
PROMISE TO PAY OUT OF FUNDS OR PROPERTY OF PRINCIPAL DEBTOR	78
CONTRACTS OF LAW MERCHANT—ORAL PROMISE TO INDORSE— ORAL ACCEPTANCE OR PROMISE TO ACCEPT.....	79
CONTRACTS IN PART WITHIN THE STATUTE.....	80
FRAUDULENT REPRESENTATIONS AFFECTING THE CREDIT OF AN- OTHER—LORD TENTERDEN'S ACT.....	81

CHAPTER VII

FORM OF THE WRITING NECESSARY TO SATISFY THE STATUTE OF FRAUDS.

CONFLICT OF LAWS AS TO THE STATUTE

	SEC.
IN GENERAL.....	82
WHEN THE WRITING MUST BE MADE—DELIVERY NOT NECESSARY	83
CONTRACT OR MEMORANDUM MUST BE SIGNED—SUFFICIENCY OF THE SIGNING—PARTIES.....	84
WHOLE CONTRACT MUST APPEAR.....	85
SAME—MUST THE WRITING EXPRESS THE CONSIDERATION?.....	86
WHAT SUFFICIENT EXPRESSION OF CONSIDERATION.....	87
CONFLICT OF LAWS AS TO THE STATUTE OF FRAUDS.....	88

CHAPTER VIII

CONSTRUCTION AND INTERPRETATION OF CONTRACTS OF SURETYSHIP AND GUARANTY

	SEC.
SCOPE OF SURETY'S UNDERTAKING—IN GENERAL.....	89
INTERPRETATION—IN GENERAL—THE RULE OF STRICTISSIMI JURIS	90
SAME—COMMERCIAL GUARANTIES.....	91
PAROL OR EXTRINSIC EVIDENCE IN AID OF INTERPRETATION—INTER- PRETATION BY PARTIES.....	92
CONSTRUCTION OF CONTRACT OF CORPORATE SURETY IN NATURE OF INSURANCE POLICY.....	93
SAME—"LARCENY AND EMBEZZLEMENT" AND OTHER TERMS DE- SCRIPTIVE OF THE RISK.....	94
SAME—CREDIT INDEMNITY BONDS—"INSOLVENCY," "FAILURE," ETC.	95

CHAPTER IX

GENERAL AND SPECIAL GUARANTIES, CONTINUING AND NON-CONTIN- UING AND LIMITED AND UNLIMITED GUARANTIES

ABSOLUTE AND CONDITIONAL GUARANTIES

	SEC.
GENERAL AND SPECIAL GUARANTIES—DEFINED AND DISTINGUISHED	96
CONTINUING AND NON-CONTINUING GUARANTIES—IN GENERAL.. .	97

	SEC.
WHAT DEEMED CONTINUING GUARANTY.....	98
EXAMPLES OF CONTINUING GUARANTIES.....	99
WHAT GUARANTIES ARE NOT CONTINUING.....	100
GUARANTY LIMITED AS TO AMOUNT OR AS TO AMOUNT OF CREDIT TO PRINCIPAL.....	101
LIABILITY OF GUARANTOR UNDER RENEWAL OF LEASE OR CONTRACT OF EMPLOYMENT.....	102
REVOCATION OF CONTINUING GUARANTY—NOTICE—DEATH.....	103
SAME—FIDELITY AND GUARANTY BONDS—SPECIAL TERMS AS TO RE- VOCATION UPON NOTICE.....	104
ABSOLUTE OR CONDITIONAL GUARANTY—PAYMENT—COLLECTION....	105
SAME—WHAT GUARANTIES DEEMED ABSOLUTE AND WHAT CONDI- TIONAL—EXAMPLES.....	106
WHAT CONSTITUTES DUE DILIGENCE WHERE GUARANTEE IS OF COLLECTION—IN GENERAL—INSOLVENCY OF PRINCIPAL.....	107
SAME—MUST CREDITOR EXHAUST COLLATERALS?.....	108
SAME—TIME AND PLACE OF BRINGING AND PROSECUTING SUIT....	109
NOTICE TO GUARANTOR OF COLLECTION.....	110
WAIVER OF DILIGENCE BY GUARANTOR.....	111

CHAPTER X

NEGOTIABILITY AND ASSIGNABILITY OF CONTRACTS OF SURETYSHIP AND GUARANTY—GUARANTY AS AN ASSIGNMENT OR INDORSEMENT	
THIRD PERSONS AS BENEFICIARIES SURETY BONDS AS A SUBSTITUTE FOR MECHANICS LIENS	

	SEC.
NEGOTIABILITY OF CONTRACTS OF GUARANTY AND SURETYSHIP—IN GENERAL.....	112
ASSIGNMENT OF CONTRACTS OF GUARANTY AND SURETYSHIP.....	113
ASSIGNMENT OF SURETY BONDS.....	114
THIRD PARTIES AS BENEFICIARIES UNDER SURETYSHIP CONTRACT..	115
SAME—SURETY BONDS AS SUBSTITUTES FOR MECHANICS' LIENS....	116

CHAPTER XI

SURETY'S RIGHT TO REIMBURSEMENT OR INDEMNITY

	SEC.
NATURE AND ORIGIN OF THE RIGHT.....	117
SURETY CLAIMING REIMBURSEMENT MUST SIGN AT PRINCIPAL'S REQUEST.....	118
WHEN SURETY'S RIGHT TO INDEMNITY ARISES.....	119
PARTIES TO ACTIONS FOR REIMBURSEMENT—CO-SURETIES.....	120
SAME—INDEMNITY BY JOINT PRINCIPALS—SURETY FOR ONE OF SEV- ERAL PRINCIPALS.....	121
WHEN THE SURETY'S ACTION FOR REIMBURSEMENT OR INDEMNITY ACCRUES.....	122
PAYMENT IN SPITE OF PRINCIPAL'S DEFENCES.....	123
SAME—STATUTE OF LIMITATIONS.....	124
BANKRUPTCY OF PRINCIPAL.....	125
FAILURE OF SURETY TO INTERPOSE HIS OWN DEFENCES.....	126

	SEC
AMOUNT RECOVERABLE BY SURETY UNDER HIS RIGHT TO INDEMNITY.....	127
SAME—INTEREST, COSTS AND DAMAGES.....	128
SET OFF AS AFFECTING THE RIGHT TO REIMBURSEMENT—INSOLVENCY OF PRINCIPAL—RETENTION OF FUNDS—WHEN ACTION BY PRINCIPAL AGAINST SURETY WILL BE STAYED.....	129
WHAT CONSTITUTES PAYMENT—SURETY'S OWN BILL OR NOTE....	130
EXPRESS CONTRACTS TOUCHING REIMBURSEMENT OR INDEMNITY...	131
CORPORATE SURETY BONDS—EVIDENCE AGAINST RISK WHERE SURETY SEEKS REIMBURSEMENT.....	132

CHAPTER XII

SURETY'S RIGHT OF SUBROGATION

	SEC.
OF THE NATURE OF THE RIGHT—IN GENERAL.....	133
ADMINISTERS ON EQUITABLE PRINCIPLES.....	134
SAME—SUBROGATION AS AGAINST THIRD PERSONS,—IGNORANCE OF SECURITY—SECURITIES GIVEN SINCE SURETY BECAME BOUND..	135
WHEN THE SURETY'S RIGHT TO SUBROGATION ARISES OR BECOMES ENFORCEABLE.....	136
SURETY FOR ONE OF SEVERAL DEBTS OR INSTALLMENTS.....	137
PAYMENT BY GUARANTOR OR SURETY MUST BE COMPULSORY—VOLUNTEERS.....	138
SAME—SURETY SIGNING WITHOUT REQUEST.....	139
SUBROGATION OF SURETY TO SPECIALTY OR JUDGMENT—DIRECT AND COLLATERAL SECURITIES.....	140
OTHER DIRECT SECURITIES.....	141
SAME—PAYMENT BY JOINT DEBTOR NOT A SURETY.....	142
HOW RIGHT OF SUBROGATION UNDER JUDGMENT OR SPECIALTY ENFORCED—SUBROGATION TO JUDGMENT LIEN.....	143
SUBROGATION TO VENDOR'S LIEN FOR PURCHASE MONEY.....	144
MISCELLANEOUS LIENS AND SECURITIES.....	145
SUBROGATION TO PRIORITIES OF CREDITOR.....	146
LOSS OR SURRENDER OF SECURITIES AS RELEASE OF SURETY.....	147
ASSIGNMENT OF SURETY'S RIGHTS.....	148

CHAPTER XIII

CO-SURETIES AND CONTRIBUTION BETWEEN CO-SURETIES

	SEC.
GENERAL NATURE OF THE RIGHT OF CONTRIBUTION—IN EQUITY AND AT LAW.....	149
WHO ENTITLED TO CONTRIBUTION—CO-SURETIES—PAROL EVIDENCE.....	150
IS SURETY ENTITLED TO CONTRIBUTION FROM CO-SURETY WHO BECAME BOUND AT HIS REQUEST?.....	151
SUCCESSIVE SURETIES—SURETY FOR A SURETY.....	152
SUCCESSIVE PARTIES TO BILLS AND NOTES AS CO-SURETIES.....	153
WHEN RIGHT TO CONTRIBUTION ARISES—STATUTE OF LIMITATIONS	154

	SEC.
PAYMENT MUST BE COMPULSORY.....	155
AMOUNT RECOVERABLE UNDER RIGHT TO CONTRIBUTION—PAYMENT BY BILL OR NOTE.....	156
CONTRIBUTION AS AFFECTED BY SPECIAL CONTRACT.....	157

CHAPTER XIV

DEFENSES TO ACTIONS FOR CONTRIBUTION

	SEC.
IN GENERAL.....	158
SURETY INDEMNIFIED.....	159
GIVING TIME TO CO-SURETY OR PRINCIPAL.....	160
RELEASE OF PRINCIPAL OR CO-SURETY BY SURETY OR WITH HIS CONSENT.....	161
RELEASE OR LOSS BY SURETY OF COLLATERAL SECURITY AS AFFECT- ING RIGHT TO CONTRIBUTION.....	162
BANKRUPTCY OF CO-SURETY.....	163
DEATH OF CO-SURETY.....	164
STATUTE OF LIMITATIONS.....	165
SET-OFF AND COUNTERCLAIM AS AFFECTING THE RIGHT TO CON- TRIBUTION.....	166
MISCONDUCT OF SURETY AS AFFECTING RIGHT TO CONTRIBUTION...	167

CHAPTER XV

CO-SURETIES AND SUBROGATION OF CO-SURETIES

	SEC.
SUBROGATION OF CO-SURETIES TO SECURITIES HELD OF PRINCIPAL...	168
SUBROGATION OF SURETY TO RIGHTS OF CREDITOR AGAINST CO- SURETIES.....	169
SAME—SUBROGATION AS AGAINST ESTATE OF INSOLVENT CO-SURETY	170
DUTY OF SURETY TO PRESERVE AND APPLY SECURITIES HELD OF PRINCIPAL FOR BENEFIT OF CO-SURETIES.....	17

1

CHAPTER XVI

SURETY'S RIGHT TO SEND CREDITOR AGAINST THE PRINCIPAL OR TO
COMPEL PRINCIPAL TO EXONERATE HIM

SUBROGATION OF CREDITOR TO SECURITIES HELD BY CO-SURETY

	SEC.
SURETY'S RIGHT AT LAW TO COMPEL CREDITOR TO SUE SURETY— THE RULE OF PAIN V PACKARD.....	172
SAME—STATUTORY PROVISIONS.....	173
FORM AND SUFFICIENCY OF NOTICE.....	174
WAIVER AND WITHDRAWAL OF NOTICE.....	175
SURETY'S RIGHT IN EQUITY TO SEND CREDITOR AGAINST PRINCIPAL.	176
EQUITY WILL COMPEL PRINCIPAL TO PAY CREDITOR AT SUIT OF SURETY.....	177
RIGHTS OF SURETY UNDER EXPRESS CONTRACT OF INDEMNITY.....	178

	SEC.
RIGHT OF SURETY TO HAVE CREDITOR RESORT TO SECURITIES GIVEN BY PRINCIPAL.....	179
EXONERATION OF SURETY BY CO-SURETY.....	180
SUBROGATION OF CREDITOR TO SECURITIES HELD BY SURETY.....	181
SAME—RELEASE BY SURETY OF SECURITIES HELD OF PRINCIPAL.....	182
RELEASE OF SURETY AS AFFECTING CREDITOR'S RIGHT OF SUBROGA- TION TO DEBTOR'S SECURITIES HELD BY SURETY.....	183

CHAPTER XVII

WHEN DEMAND UPON PRINCIPAL AND NOTICE OF HIS DEFAULT NECES- SARY TO CHARGE SURETY OR GUANTOR	
	SEC.
SURETY OR ABSOLUTE GUARANTOR NOT USUALLY ENTITLED TO DEMAND OR NOTICE—MAJORITY VIEW.....	184
AUTHORITIES REQUIRING REASONABLE NOTICE—MINORITY VIEW— RULE AS TO FUTURE ADVANCES.....	185
TIME AND SUFFICIENCY OF NOTICE OF PRINCIPAL'S DEFAULT— PLEADING.....	186
EXPRESS STIPULATIONS FOR NOTICE OR PROOFS OF DEFAULT—FI- DELITY AND GUARANTY BONDS.....	187
SAME—PROOFS OF LOSS—WAIVER AND ESTOPPEL.....	188
SAME—DOES WAIVER BY SURETY COMPANY AFFECT ITS RIGHT TO INDEMNITY AGAINST THE RISK.....	189

CHAPTER XVIII

PAYMENT OR SATISFACTION AND TENDER BY PRINCIPAL AS DISCHARGE OF SURETY	
SET OFF AND COUNTERCLAIM IN FAVOR OF PRINCIPAL	
	SEC.
PAYMENT OF SATISFACTION—IN GENERAL.....	190
APPLICATION OF PAYMENTS.....	191
TENDER BY PRINCIPAL AS DISCHARGE OF SURETY.....	192
DUTY OF CREDITOR TO APPLY FUNDS OR PROPERTY OF PRINCIPAL IN HIS HANDS—BANK DEPOSITS.....	193
MAY SURETY HAVE BENEFIT OF SET-OFF OR COUNTERCLAIM IN FAV- OR OF HIS PRINCIPAL.....	194

CHAPTER XIX

DISCHARGE BY THE ACT OR OPERATION OF LAW	
	SEC.
DISCHARGE OF PRINCIPAL BY ACT OF LAW DOES NOT DISCHARGE SURETY —IN GENERAL—BANKRUPTCY OF PRINCIPAL.....	195
BANKRUPTCY OF PRINCIPAL AS A BAR TO SURETY'S RIGHT TO RE- IMBURSEMENT.....	196
BANKRUPTCY OF SURETY.....	197
CHANGE OF PARTIES WHERE INDIVIDUAL OR FIRM IS PRINCIPAL OR CREDITOR.....	198
DEATH OF PRINCIPAL OR SURETY—JOINT OBLIGATIONS.....	199
SAME—JOINT AND SEVERAL PROMISORS.....	200

	SEC.
EFFECT OF SURETY'S DEATH AS TO LIABILITY FOR FUTURE ADVANCES TO PRINCIPAL.....	201
SAME—DEATH OF SURETY OR GUARANTOR FOR PRINCIPAL IN PARTICULAR OFFICE OR EMPLOYMENT.....	202
DEATH OF JOINT PRINCIPAL.....	203
LAPSE OF TIME—STATUTE OF LIMITATIONS AND LACHES OF THE CREDITOR.....	204
MAY PRINCIPAL WAIVE BENEFIT OF STATUTE OF LIMITATIONS SO AS TO BIND SURETY.....	205
WHEN STATUTE RUNS WHERE PRINCIPAL'S FRAUD IS CONCEALED..	206

CHAPTER XX.

DISCHARGE OF SURETY BY RETENTION OF DEFAULTING AGENT OR SERVANT

SURETY BOND—SUPERVISION OF RISK BY EMPLOYER

	SEC.
RULE STATED—DISHONESTY OR OTHER DEFAULTS—KNOWLEDGE OF DEFAULT.....	207
SAME—SPECIAL TERMS IN SURETY'S CONTRACT—SUPERVISION OF BONDED OFFICER OR EMPLOYEE—CORPORATE FIDELITY BONDS.	208

CHAPTER XXI

ALTERATION OR VARIATION OF PRINCIPAL'S CONTRACT OR OF SURETY'S RISK WITHOUT SURETY'S CONSENT

	SEC.
ALTERATION OR VARIATION OF PRINCIPAL'S CONTRACT—IN GENERAL.....	209
SAME—ALTERATION BY STRANGER—SPOILIATION	210
BY WHOM AND UNDER WHAT CIRCUMSTANCES ALTERATION MUST BE MADE TO RELEASE SURETY—CONSENT OF SURETY.....	211
NEGOTIABLE INSTRUMENTS—NEGLIGENT EXECUTION—EXECUTION IN BLANK.....	212
ALTERATION TO DISCHARGE SURETY MUST BE MATERIAL.....	213
SAME—CHANGE BENEFICIAL TO SURETY.....	214
ALTERATION OF CONTRACTS FOR PERSONAL SERVICE OR IN DUTIES OF EMPLOYEE.....	215
SAME—EXAMPLES OF MATERIAL CHANGES IN DUTIES OF OFFICE OR EMPLOYMENT DISCHARGING SURETY..	216
SAME—CHANGE IN OR ENLARGEMENT OF PRINCIPAL'S BUSINESS..	217
SAME—CHANGE AS TO TIME OR MODE OF ACCOUNTING.....	218
SAME—CHANGE IN COMPENSATION OF PRINCIPAL OR IN TIME OR MODE OF PAYMENT.....	219
SAME—CHANGE OF CONTRACT, DUTY OR EMPLOYMENT OF RISK UNDER CORPORATE FIDELITY AND CONTRACT BONDS.....	220
ALTERATION OF CONTRACTS FOR PARTICULAR WORKS.....	221
SAME—CONTRACT INSURANCE BONDS.....	222
ALTERATION OF LEASE AS DISCHARGE OF SURETY.....	223

CHAPTER XXII

RELEASE OF SURETY BY INDULGENCE TO PRINCIPAL LACHES—EXTENSION OF TIME WITHOUT CONSENT OF SURETY

	SEC.
MERE VOLUNTARY INDULGENCE TO PRINCIPAL OR INACTION OF CREDITOR USUALLY NO DISCHARGE OF SURETY.....	224
EXTENSION OF TIME TO PRINCIPAL AS DISCHARGE OF SURETY—IN GENERAL.....	225
DOES UNAUTHORIZED EXTENSION OF TIME RELEASE SURETY MAKER OR CO-MAKER UNDER THE NEGOTIABLE INSTRUMENTS LAW...	226
AGREEMENT EXTENDING TIME TO PRINCIPAL MUST BE BINDING—FORBEARANCE UNDER VOID AGREEMENT DOES NOT RELEASE SURETY.....	227
SAME—WHERE CREDITOR RESERVES HIS RIGHTS AGAINST THE SURETY.....	228
FORM IN WHICH RIGHTS MUST BE RESERVED.....	229
EXTENSION OF TIME WHERE SURETY INDEMNIFIED.....	230
EXTENSION OF TIME WHERE SURETY CONSENTS—WAIVER OR RELEASE	231
EXTENSION MUST BE FOR DEFINITE TIME.....	232

CHAPTER XXIII

EXTENSION OF TIME TO PRINCIPAL CONTINUED—RELEASE OF PRINCIPAL OR CO-SURETY—COVENANTS NOT TO SUE

	SEC.
CONTRACTS EXTENDING TIME MUST BE UPON CONSIDERATION IN ORDER TO RELEASE SURETY.....	233
WHAT CONSTITUTES SUFFICIENT CONSIDERATION FOR VALID EXTENSION—PAYMENT OF INTEREST OR PROMISES TO PAY IT.....	234
USURIOUS INTEREST AS A CONSIDERATION FOR EXTENSION AGREEMENT.....	235
CREDITOR MUST HAVE KNOWLEDGE OF SURETYSHIP RELATION.....	236
IS SURETY ON SPECIALTY DISCHARGED BY PAROL EXTENSION.....	237
PLEADING EXTENSION OF TIME.....	238
PROOF AND PRESUMPTIONS OF EXTENSION OF TIME.....	239
RELEASE OF PRINCIPAL AS RELEASE OF SURETY.....	240
RELEASE OF SURETY AS RELEASE OF CO-SURETY.....	241
COVENANTS NOT TO SUE CO-DEBTOR OR PRINCIPAL—EFFECT OF RESERVATION OF RIGHTS.....	242
HOW RESERVATION OF RIGHTS MUST BE MADE.....	243
RELEASE OF PRIOR PARTY TO COMMERCIAL PAPER AS RELEASE OF SUBSEQUENT PARTY.....	244

CHAPTER XXIV

CREDITOR'S NEGLIGENCE TO OBTAIN SECURITIES

LOSS OR SURRENDER OF SECURITIES BY CREDITOR—ESTOPPEL OF CREDITOR TO CALL UPON SURETY

	SEC.
RELEASE OF SECURITIES—IN GENERAL.....	245
EXTENT TO WHICH SURETY RELEASED IF SECURITIES LOST OR IMPAIRED.....	246

CREDITOR NEED NOT SEEK OR ACTIVELY ENFORCE SECURITY.....	SEC. 247
SAME—FAILURE TO RECORD MORTGAGE.....	248
MISCELLANEOUS RULES AND INSTANCES TOUCHING LOSS OR IMPAIRMENT OF SECURITIES.....	249
SAME—RELINQUISHMENT OF LIEN OBTAINED BY LEGAL PROCESS	250
RELEASE OF SECURITIES HELD OF CO-SURETY.....	251
CREDITOR INDUCING SURETY TO BELIEVE DEBT IS PAID, OR THAT SURETY WOULD NOT BE CALLED UPON—ESTOPPEL.....	252

CHAPTER XXV

EFFECT OF JUDGMENT FOR OR AGAINST PRINCIPAL OR SURETY—ADMISSIONS OF PRINCIPAL OR SURETY

JUDGMENT IN FAVOR OF PRINCIPAL AS DISCHARGE OF SURETY....	SEC. 253
HOW FAR ADJUDICATION AGAINST PRINCIPAL BINDING ON SURETY OR EVIDENCE AGAINST HIM.....	254
HOW FAR JUDGMENT AGAINST SURETY BINDS PRINCIPAL OR CO-SURETY.....	255
HOW FAR JUDGMENT IN FAVOR OF SURETY PROTECTS PRINCIPAL...	256
HOW FAR STATEMENTS AND ADMISSIONS OF PRINCIPAL BINDING ON OR ADMISSIBLE AGAINST SURETY.....	257

CHAPTER XXVI

OFFICIAL BONDS

IN GENERAL—OF WHOM REQUIRED.....	SEC. 258
CONSTRUCTION OF OFFICIAL BONDS.....	259
BOND OF DE FACTO OFFICER VALID—ESTOPPEL.....	260
HOW FAR SURETY'S LIABILITY DEPENDENT UPON FORM OF BOND....	261
SAME—STATUTES REQUIRING BOND TO BE APPROVED OR FILED—OTHER REQUIREMENTS.....	262
VOLUNTARY BONDS OR UNDERTAKINGS.....	263
SCOPE OF SURETY'S LIABILITY—BOND COVERS OFFICIAL ACTS ONLY—WHAT ACTS DEEMED OFFICIAL.....	264
SURETIES FOR JUDICIAL OFFICERS—LIABILITY FOR JUDICIAL AND MINISTERIAL ACTS.....	265
SURETIES FOR ONE OFFICE NOT BOUND FOR DEFAULTS IN ANOTHER.	266
SURETIES ANSWERABLE FOR DEFAULTS OF DEPUTIES.....	267
HOW FAR SURETIES LIABLE FOR LOSS OF PUBLIC FUNDS—MAJORITY VIEWS.....	268
SAME—MINORITY VIEW.....	269
TIME OF DEFAULT FOR WHICH SURETIES LIABLE.....	270
HOW FAR OFFICERS STATEMENTS AND ACCOUNTS COMPETENT OR CONCLUSIVE AGAINST HIS SURETIES.....	271
HOW FAR JUDGEMENT AGAINST OFFICIAL PRINCIPAL CONCLUDES HIS SURETIES.....	272
ALTERATION IN OFFICIAL BOND.....	273
CHANGE IN OFFICIAL DUTIES OR COMPENSATION.....	274

	SEC.
EXTENSION OF TIME FOR ACCOUNTING.....	275
DISCHARGE OF SURETY BY MISREPRESENTATION OR CONCEALMENT OF PRIOR OR SUBSEQUENT DEFAULTS—LACHES.....	276
EFFECT OF NEW OR ADDITIONAL BONDS.....	277

CHAPTER XXVII

SURETIES UPON BONDS AND UNDERTAKINGS IN THE COURSE OF JUDICIAL PROCEEDINGS

ATTACHMENT BONDS

	SEC.
IN GENERAL—INTERPRETATION.....	278
ATTACHMENT BONDS—NATURE AND PURPOSE.....	279
FORM AND CONDITIONS OF BOND—DEFECTIVE BOND.....	280
EXTENT OF LIABILITY OF SURETIES—BREACH OF BOND.....	281
OTHER BONDS GIVEN IN ATTACHMENT PROCEEDINGS—FORTHCOMING OR REDELIVERY BONDS.....	282
BONDS TO DISSOLVE ATTACHMENT.....	283

CHAPTER XXVIII

REPLEVIN BONDS

	SEC.
IN GENERAL.....	284
FORM, EXECUTION AND CONDITIONS OF REPLEVIN BOND.....	285
BREACH OF BOND.....	286
EFFECT OF ADJUDICATION AGAINST PLAINTIFF UPON LIABILITY OF SURETY.....	287
DAMAGES ON REPLEVIN BONDS.....	288

CHAPTER XXIX

BONDS AND UNDERTAKINGS ON APPEAL

	SEC.
IN GENERAL.....	289
FORM AND EXECUTION OF APPEAL BONDS.....	290
CONSIDERATION FOR UNDERTAKINGS ON APPEAL—ESTOPPEL.....	291
BREACH OF CONDITION.....	292
SURETIES ON SUCCESSIVE APPEAL BONDS.....	293
REMEDY—DAMAGES ON APPEAL AND SUPERCEDEAS BONDS.....	294

CHAPTER XXX

RECEIVER'S BONDS—INJUNCTION BONDS

RECEIVER'S BONDS

	SEC.
RECEIVER'S BONDS—IN GENERAL.....	295
LIABILITY OF SURETIES ON RECEIVER'S BONDS.....	296
SAME—HOW FAR JUDGMENT OR DECREE AGAINST RECEIVER BINDS SURETIES.....	297

INJUNCTION BONDS

	SEC.
INJUNCTION BONDS—IN GENERAL—WHEN REQUIRED.....	298
LIABILITY OF SURETIES ON INJUNCTION BONDS.....	299
REMEDY ON INJUNCTION BONDS.....	300
THE DAMAGES.....	301

CHAPTER XXXI

BAIL

	SEC.
DEFINITION AND NATURE.....	302
FORM AND REQUISITES OF THE UNDERTAKING—BAIL BOND—RECOGNIZANCE.....	303
LIABILITY OF BAIL—BREACH OF BOND—EXONERATION.....	304
ACT OF GOD OR OF THE LAW AS EXONERATING BAIL.....	305
EXONERATION OF BAIL BY ACT OF LAW.....	306
SAME—SUBSEQUENT IMPRISONMENT OF PRINCIPAL—PARDON.....	307
DISCHARGE OF PRINCIPAL IN BANKRUPTCY.....	308
SAME—RELEASE OF BAIL BY ALTERATION OF CONTRACT.....	309
RELIEF FROM FORFEITURE.....	310
REIMBURSEMENT AND INDEMNIFICATION OF BAIL.....	311
NEW EXHAUST BONDS.....	312

CHAPTER XXXII

SURETIES OF EXECUTORS AND ADMINISTRATORS

	SEC.
IN GENERAL—WHEN BOND REQUIRED.....	313
FORM AND REQUISITES OF BOND.....	314
EXTENT OF LIABILITY ON ADMINISTRATION BONDS.....	315
ESTOPPEL OF SURETIES.....	316
PROPERTY COVERED BY THE BOND.....	317
SAME—DEBTS DUE FROM EXECUTOR OR ADMINISTRATOR.....	318
SAME—FOREIGN ASSETS.....	319
LIABILITY OF SURETIES ON BONDS OF CO-EXECUTORS AND CO-ADMINISTRATORS.....	320
SURETIES OF EXECUTOR OR ADMINISTRATOR LIABLE FOR OFFICIAL MISCONDUCT ONLY.....	321
WHAT CONSTITUTES BREACH OF BOND.....	322
SAME—DEVASTATION—MALADMINISTRATION—NEGLIGENCE.....	323
SAME—FAILURE TO PAY CLAIMS, LEGACIES OR DISTRIBUTIVE SHARES.....	324
FAILURE TO ACCOUNT.....	325
SPECIAL BOND UPON SALE OF REAL ESTATE—LIABILITY OF SPECIAL AND GENERAL BONDS.....	326
ADDITIONAL, SUCCESSIVE AND SUBSTITUTED BONDS—CONTRIBUTION.....	327
DURATION OF LIABILITY OF SURETIES FOR EXECUTORS OR ADMINISTRATORS—DISCHARGE OF SURETY—IN GENERAL.....	328
DEATH OF PRINCIPAL OR SURETY.....	329
REMOVAL OR RESIGNATION OF PRINCIPAL.....	330

	SEC.
SETTLEMENT BY AND DISCHARGE OF PRINCIPAL—EFFECT OF ADJUDICATION AGAINST PRINCIPAL.....	331
ALTERATION OF BOND OR GIVING TIME TO PRINCIPAL.....	332
RETENTION OF PROPERTY IN DIFFERENT CAPACITY.....	333
GIVING NEW BOND OR SPECIAL BOND FOR DISTRIBUTIVE SHARE....	334
STATUTE OF LIMITATIONS.....	335

CHAPTER XXXIII

GUARDIANSHIP BONDS

	SEC.
NATURE AND NECESSITY.....	336
AMOUNT, FORM AND REQUISITES OF THE BOND.....	337
WHAT COVERED BY BOND.....	338
ADDITIONAL AND SUBSTITUTED BONDS.....	339
SAME—ONE GUARDIAN FOR SEVERAL WARDS OR SEVERAL GUARDIANS FOR SAME WARD.....	340
WHEN GUARDIAN AND HIS SURETIES AS SUCH CHARGEABLE—SAME PERSON GUARDIAN AND PERSONAL REPRESENTATIVE.....	341
ADJUDICATION AGAINST GUARDIAN CONCLUSIVE AGAINST SURETIES.	342
SETTLEMENT WITH WARD OUT OF COURT.....	343
SUITS UPON GUARDIAN'S BONDS—DAMAGES—DEFENCES.....	344

SURETYSHIP.

CHAPTER I.

INTRODUCTORY. SURETYSHIP IN GENERAL. DEFINITIONS AND GENERAL CHARACTERISTICS.

§ 1. Of Suretyship in General—Real and Personal Suretyship Distinguished. Various definitions of suretyship have been given by courts and text writers, none of which seem entirely satisfactory. Suretyship in its broadest sense includes a variety of transactions, often with distinctive appellations, and may be generally defined as that situation directly or indirectly arising from the act of the parties, rather than by mere operation of law, in which one party becomes answerable, directly and personally, or indirectly and in his property, for the debt, default or miscarriage of another;¹ and a surety has been defined as “a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have made payment or performed before the surety was compelled to do so.”²

1. Mr. Brandt, the leading American text writer on this subject, defines a surety or guarantor as one who becomes responsible for the debt, default or miscarriage of another person, 1 Sur. & Guar. (3rd Ed.), sec. 1, where other definitions are found in the notes. Among them is the facetious one quoted by Judge Lumpkin in *Jones v. Whitehead*, 4 Ga. 397, who says: “Suretyship has been defined as a lame substitute for a thorough knowledge of human nature.” See also Halsbury’s Laws of England, vol. XV, pp. 439, 440, 441.

2. Cooley, J., in *Smith v. Shelden*, 35 Mich. 42, 24 Am. R. 529. Whenever, as between two persons liable for the same debt, it is the debt of one of them, the other may be said to be his surety. *Wend*

The term *real suretyship* sometimes met with in the books, and included in the definition first given, signifies that situation in which specific property of one not personally liable therefor, is nevertheless bound for the debt or demand of another.³ The party for whose debt or obligation the surety or his property is bound is called the principal debtor, principal obligor, or simply the principal, and the party to whom he and the surety are bound is termed the creditor or obligee.

§ 2. Suretyship Relation May be Shown by Parol.

When the suretyship relation does not appear on the face of the instrument by which the parties become bound, it is quite generally settled that evidence aliunde is admissible both at law and in equity to show such relation and that the creditor had notice of it, the objection that such evidence tends to vary or contradict a written contract being met by the answer that suretyship is a fact collateral or extraneous to the contract itself rather than a part of it, whether the instrument be under seal or not.⁴

Where several sign a contract wherein one or some of them are described as sureties, while prima facie they will be deemed sureties, parol evidence is quite generally admitted in an action for indemnity or contribution to show that one or some were to be regarded as principals rather than as co-sureties inter se. This is not varying

landt v. Sohre, 37 Minn. 162. See, also, Omaha Nat. Bank v. Johnson, 111 Wis. 372.

As to the right of sureties in bail in criminal cases to enforce indemnification, see Post, sec. 311.

3. See Post, secs. 9, 10. St. Croix Timber Co. v. Joseph, 142 Wis. 55, 61. An oral pledge of property by one to secure the debt of another creates a valid lien upon the property pledged, though void under the statute of frauds as to any personal liability of the pledgor. Smith v. Mott, 76 Cal. 171. See also Rowan v. Sharp's Rifle Co., 33 Conn. 1 and cases cited.

4. Pooley v. Herradine, 7 El. & Bl. 439, 90 E. C. L. 430; Holt v. Bodey, 18 Pa. St. 207; Harris v. Brooks, 31 Pick. (Mass.) 195, 32 Am. D. 254; Hubbard v. Gurney, 64 N. Y. 457, discussing many authorities. Piper v. Newcomber, 25 Ia. 221; Burke v. Cruger, 6 Tex. 66, 58 Am.

the terms of a written contract, for the written contract is with the creditor.⁵

§ 3. Suretyship in Its Narrower or Specific Sense—Distinguished From Guaranty. The term suretyship is frequently employed in a narrow, technical or specific sense, usually to distinguish it from that particular form of suretyship in its broad sense known as guaranty.⁶ Frequently this distinction is not important to be made, as the same rules often govern the relations of the parties whether a given transaction is strictly and technically a suretyship or a guarantee, and courts and text writers frequently use either term to describe the same contract with little or no regard to any technical differences or distinctions between them.⁷ Still a distinction between suretyship and guaranty must often be drawn as the same principles do not always apply to both undertakings. A surety, strictly speaking, is one who is bound with the principal, usually jointly or jointly and severally, by or upon the same contract or

D. 102; *Irvine v. Adams*, 48 Wis. 468, 33 Am. R. 817. Some cases hold that such evidence is admissible in equity but not at law, at least in the case of sealed instruments. See *Hubbard v. Gurney*, *supra*, showing the unreasonableness of this distinction. Compare *Pooley v. Herdine*, *supra*, with *Reese v. Berrington*, 2 Ves. 542.

5. See Post, secs. 150, 153 and cases cited. *Apgar v. Hiler*, 24 N. J. Law, 812, and authorities cited. *Crosby v. Wyatt*, 23 Me. 156; *Chapeze v. Young*, 87 Ky. 476; *Wharton v. Woodburne*, 20 N. Car. 507.

6. The words guaranty and warranty were originally the same, and are still used occasionally in the same sense. In strict usage, however, warranty applies to an undertaking by a vendor as to the title or quality of a thing sold, while guaranty is confined to a contract to answer for some debt or engagement of another. *Ayers v. Finley*, 1 Barr (Pa.), 501; *Field v. Sampson*, etc. Mfg. Co., 162 Mass. 388, 27 L. R. A. 136.

7. See 15 Halsbury's Laws of Eng. Tit. Guarantee, under which the general law of suretyship is discussed. See, also, Fell on Guaranty (3rd Ed. 1872); *Harris v. Newell*, 42 Wis. 687, 690, and the confused use of terms in *Wright v. Shorter*, 56 Ga. 72, by Bleckley, J., and in *Bank v. Kercheval*, 2 Mich. 508. The difference between sureties, who directly and absolutely undertake to pay, and guarantors, who undertake that the principal shall pay, is merely formal. Their rights so

instrument. While both guaranty and suretyship are undertakings for the debt or default of another and hence accessory, a strict suretyship is a primary and direct undertaking, while a guaranty is secondary and collateral. The surety may usually be sued with his principal, while the guarantor, being bound upon a separate and distinct contract, cannot ordinarily be so sued unless statutes permit.⁸ Being bound with the principal upon the same contract for the same thing, the surety is in default the moment his principal is in default and no notice of the principal's default is necessary to charge the surety unless, as is common in corporate surety bonds, he has expressly stipulated for it,⁹ nor is he released, ordinarily, by the creditor's delay to prosecute the principal or otherwise to use diligence to collect the debt. The obligation is as much his as his principal's.¹⁰

The strict guarantor, on the other hand, is sometimes entitled to have demand made upon the principal and may be released by want of notice of the principal's default to the extent, at least, that he is injured thereby;¹¹ and, where the guarantee is of collection rather

far as dependent upon the relation of the creditor and the principal are the same. *Jamieson v. Holm*, 69 Ill. App. 119.

8. *Shore v. Lawrence*, 68 W. Va. 220; *Northern State Bank v. Bellamy*, 19 N. Dak. 509, 31 L. R. A. (N. S.) 149; *U. S. v. Cushman*, 2 Sumn. (U. S.) 426; *Hall v. Weaver*, 34 Fed. 104; *Kearens v. Montgomery*, 4 W. Va. 29; *Riley v. Jarvis*, 43 W. Va. 43; *Harris v. Newell*, 42 Wis. 683, 691. Even where the surety does not sign a note or other obligation or appear as promisor in the body of it, but signs a memorandum thereon that he binds himself as "surety" therefor, he is jointly and severally liable with the principal and may be sued with him. *Riley v. Jarvis*, *supra*; *Hunt v. Adams*, 3 Mass. 358; *Courtis v. Dennis*, 7 Met. (Mass.) 518; *Wilson v. Campbell*, 1 Scam. (Ill.) 493. As to defenses based upon the joint nature of the contract of principal and surety, see *Post*, secs. 199, 200, 240 et seq.

9. *Post*, secs. 184, 187; *Train v. Jones*, 11 Vt. 444; *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686.

10. *Post*, secs. 172, 452; *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. R. 210; *Campbell v. Sherman*, 151 Pa. St. 70, 31 Am. St. R. 735; *Kearens v. Montgomery*, 4 W. Va. 29; *Harris v. Newell*, 42 Wis. 687. That the statute of frauds does not apply to such a joint undertaking, see *Casey v. Barbason*, 10 Abb. Pr. Rep. 368, and *Post*, sec. 67.

11. *Post*, secs. 184, 185.

than of payment or performance, the guarantor is usually released by the creditor's failure to prosecute his legal remedies diligently against the principal.¹²

But where the guaranty is absolute, i. e., of strict payment or performance, most courts hold that the guarantor is not entitled to notice of default, nor released though injured by want of it, nor is the creditor bound for diligence against the principal. Such a guaranty is, in these states, practically a suretyship, with the difference that the guarantor must be sued alone unless statutes provide otherwise,¹³ and that the Statute of Frauds applies to his undertaking, whereas it is inapplicable if he is strictly a joint promisor, though he is also a surety.¹⁴ The statement often met with that the contract of a surety is "direct and primary," while that of the guarantor is "secondary and collateral," is essentially correct. But the further statements that "the surety agrees to pay if the principal does not; the guarantor undertakes to pay if he cannot," and the like, are misleading in most states when applied to an absolute and unconditional guaranty of payment or performance, and should be confined to conditional guarantees, or guarantees of collection merely. The confusion on the subject is no doubt attributable in part to the fact that in a few states a guaranty of "payment" in general terms as distinguished from a guaranty of payment or performance "at maturity," or "when due," is interpreted as a guaranty of collection requiring due diligence of the creditor against the principal debtor to enforce collection or a showing of the principal's insolvency before the creditor can come upon the guarantor.¹⁵

12. Post, secs. 105 et seq.

13. Post, sec. 184; *Phelps v. Church*, 65 Mich. 231; *Rouse v. Wooten*, 140 N. Car. 557, 111 Am. St. R. 875.

14. Post, sec. 67.

15. See Post, sec. 106; *Piedmont Guano, etc. Co. v. Morris*, 86 Va. 941; *Kearnes v. Montgomery*, 4 W. Va. 29; *Hartley Silk Co. v. Berg*, 48 Pa. Super. Ct. 419; *Iron City Nat. Bank v. Rafferty*, 207 Pa. 238.

While the courts are not wholly agreed either as to the precise criteria for distinguishing guaranty from technical suretyship or the consequences of the distinction when made,¹⁶ this much may be considered settled: that where a party obligates himself by the very contract or undertaking which is the sole and direct foundation of the principal's liability to the creditor or obligee, he is a technical surety and not a guarantor.¹⁷ Indeed it has been held that no contract joined in by the principal debtor and another can be a contract of guaranty on the part of the latter. It is, perforce, a contract of suretyship.¹⁸ But such joinder is, by some decisions, not conclusive, and where the principal being bound by one contract, executed another jointly with the defendant to secure the performance of the first, the defendant was held a guarantor and not a surety, because he was not bound on the very contract upon which the principal's indebtedness arose, and was hence entitled to

16. See 1 Brandt Sur. & Guar. (3rd Ed.), sec. 2. and notes showing the guarded language in which the distinction is usually described.

17. Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362; 36 Am. St. R. 210; Singer Mfg. Co. v. Littler, 56 Ia. 601; Simons v. Steele, 36 N. H. 73.

The common illustration is where A and B execute a note, bond or other obligation jointly or jointly and severally, for the same payment or performance. If the consideration or the benefit of it goes to A and not to B, A is the principal and B is the surety. Omaha National Bank v. Johnson, 111 Wis. 372-374. Where a contract in writing is made between two, and a third person writes and signs underneath it at the time, "I agree to be security for the promisor in the above contract," such third person is a surety and not a guarantor. Norris v. Spencer, 18 Me. 324. See also, Sherman v. Roberts, 1 Grant's Cas. (Pa.) 261. Where, in order to induce a depositor to leave his money in bank, a third person indorsed his name on a certificate of deposit taken in lieu of a prior certificate, adding the word "surety," and was held jointly liable with the bank thereon as surety, and not as guarantor or indorser. Ballard v. Burton, 64 Vt. 387, 16 L. R. A. 664. See also, Shore v. Lawrence, 68 W. Va. 220.

18. McMillan v. Bull's Head Bank, 32 Ind. 11, 2 Am. R. 323; News Times Pub. Co. v. Doolittle, — Col. —, 118 Pac. 974; Champion, etc. Co. v. Am. Bond'g & Tr. Co., 115 Ky. 863, 103 Am. St. R. 356. See also Riley v. Jarvis, 43 W. Va. 43, and cases cited.

reasonable notice of the principal's default, and released to the extent that he was damaged by the want of it,¹⁹ under rules elsewhere discussed.²⁰ Indeed the courts in declaring a contract one of suretyship rather than of guaranty often appear to have in mind, not the joint or joint and several nature of the liability of the principal and the security, but the direct and unconditional nature of the undertaking, sometimes with reference to questions of notice of default, sometimes with reference to the necessity of notice of acceptance, and sometimes with reference to the applicability of the Statute of Frauds, and to questions of diligence under statutes or otherwise.²¹

§ 4. Contract of Indorser Distinguished from Suretyship and Guaranty. While the indorser of commercial paper is a surety in the broad sense, and whatever will discharge any other surety will ordinarily discharge

1.. *Singer Mfg. Co. v. Littler*, 56 Ia. 601; *Closson v. Billman*, 161 Ind. 610; *La Rose v. Logansport Bank*, 102 Ind. 333, 338. See also *Weed Sewing Mach. Co. v. Winchell*, 107 Ind. 260; *Comp. Cox v. Weed Sewing Mach. Co.*, 57 Miss. 350.

20. Post, sec. 185. The distinction between guaranty and suretyship is quite extensively discussed and illustrated in the note to *Pearsell Mfg. Co. v. Jeffries*, 105 Am. St. R. 503.

21. The following recent cases dealing more or less with the distinctions between guarantors and sureties will be found interesting: *Shore v. Lawrence*, 68 W. Va. 220; *Northern State Bank v. Bellamy*, 19 N. Dak. 509, 31 L. R. A. (N. S.) 149; *Rouse v. Wooten*, 140 N. Car. 557, 111 Am. St. R. 875; *Coleman v. Fuller*, 105 N. Car. 328, 8 L. R. A. 380; *Sheffield v. Whitfield*, 4 Ga. App. 762; *Bailey Loan Co. v. Seaward*, 9 S. Dak. 326, including the dissent of Fuller, J.; *McIntosh-Huntington Co. v. Reed*, 89 Fed. 464; *Parish v. Rosebud Co.*, 140 Cal. 635; *Manry v. Waxelbaum Co.*, 108 Ga. 14; *McMillan v. Bulls Head Bank*, 32 Ind. 11, 2 Am. R. 323, with which compare *Closson v. Billman*, 161 Ind. 610; *Wheeler v. Rohrer*, 21 Ind. App. 477; *Wittmer Lumber Co v Rice*, 23 Ind App. 586; *Indiana, etc Co. v. Bender*, 32 Ind. App. 287; *Galloway Coal Co. v. Hunter*, 79 Miss. 559; *Union Tr. Co. v. Citizens Tr. & Sur. Co.*, 185 Pa. St. 217; *Fields v. Willis*, 123 Ga. 272, 274, and Ga. Civ. Code, sec. 2974; *Page v. White Sewing Mach Co*, 12 Tex. Civ. App. 327, and the note thereto in 42 Cent. L. Jour. 483. The mere use of the words guarantor or guarantee is not conclusive. The test is in the nature of the contract construed as a whole. See *Riddle v. Thompson*, 104 Pa. 330; *Fields v. Willis*, supra; *Shore v. Lawrence*, supra.

him,²² there are points of difference between the undertaking of the indorser and that of the technical surety upon the one hand and the strict guarantor upon the other. The contract of the indorser is one of the law merchant, while that of the surety, unless it be upon commercial paper, is governed by the rules of the common law; and the same is true, by the weight of authority, with respect to a strict guaranty even though it be written upon a negotiable instrument, unless, perhaps, the guaranty is itself negotiable in terms.²³ The technical surety is directly, primarily and unconditionally bound to the creditor or obligee, while the contract of the indorser is always secondary and is conditional, in the absence of a waiver, upon presentment to, and demand of, the principal debtor and prompt notice of dishonor, all according to the strict rules of the law merchant.

An ordinary indorser of commercial paper is not a surety, however, within a statute permitting a surety by notice to send the creditor against the principal debtor, or otherwise expressed to be for the protection of "sureties" merely.²⁴

Though the guarantor may in some states be entitled to notice of the principal's default, the reasonableness of such notice is not determined by the strict rules of the law merchant, and unlike the indorser, he is not released by want of it unless he is injured thereby;²⁵ nor is the liability of an indorser conditional upon the diligence of the holder in pursuing legal remedies against antecedent parties, as is the case with a mere guarantor of collec-

22. *Duncan Fox & Co. v. North and South Wales Bank*, H. L. 6 App. Cas. 1, 14; *Tanner v. Gude*, 100 Ga. 157, and authorities cited; 1 *Brandt Sur. & Guar.* (3rd Ed.), sec. 3.

23. *Post*, secs. 112 et seq.

The drawer of a bill though not strictly a surety is usually in the attitude of a surety for the acceptor. See *Duncan Fox & Co. v. N. & S. Wales Bank*, *supra*.

24. *Bates v. Branch Bank*, 2 Ala. 689. See also 2 *Brandt Sur. & Guar.* (3rd Ed.), sec. 771, and cases cited.

25. *Post*, secs. 185, 186.

tion.²⁶ No notice to the strict surety of the principal's default is required unless it is expressly stipulated for by the surety.²⁷ Usually both the surety and the guarantor may set up the invalidity of the principal contract, but the rule is commonly otherwise as to the indorser. Furthermore, indorsers are *prima facie* liable in the order in which they appear upon the paper, and an indorser who pays it is presumptively entitled to full indemnity from any indorser above him, while sureties or guarantors of the same debt are ordinarily liable to contribute to one another so as to equalize the common burden.²⁸

§ 5. Accommodation Parties to Commercial Paper. An accommodation party, both at common law and under the uniform statute, is one who has signed a negotiable instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. As it is the plain moral and equitable duty of the party accommodated to pay the paper at maturity in ease of the party thus gratuitously lending his name and credit, the accommodation party has all the rights of a surety against the party accommodated, who is, as between the two, the principal debtor. As to a holder for value, however, he may be a surety only *sub modo* or in a limited sense, and if he signs as maker or acceptor rather than indorser it is doubtful whether he will be discharged in any case by such acts of the holder as would discharge an ordinary surety. As to the holder his liability is said to be direct and primary, though the latter knew when

26. Post, secs. 105 et seq.

27. Post, secs. 184, 187.

28. Post secs. 151, 152, 153. See generally as to these distinctions, 1 Brandt Sur. & Guar. (3rd Ed.), sec. 3. See, also, 2 Suth. on Dam., sec. 555.

he took the paper that the making or acceptance were for accommodation only, and hence, at least, under the Negotiable Instruments Act, he is not released by an unauthorized extension of time or surrender of collateral securities to the party accommodated. Independent of the Act, however, most of the older authorities, and many recent ones, accord him full rights of a surety as against a holder with notice of his accommodation character, though some modern cases hold otherwise. This matter is discussed later on.²⁹

§ 6. Same—Contract of Anomalous or Irregular Indorser. Where one not a party to a bill or note indorses his name thereon before its delivery to the payee for the purpose of giving it credit with the payee and subsequent holders, his indorsement is said to be irregular or anomalous. The precise nature of his liability has been the subject of almost endless discussion and much difference of opinion. In some states he appears to be treated as a first, and in others as a second, indorser; in others he is treated as the maker in the case of a note; in others as a surety; in others as a guarantor, and in some jurisdictions parol evidence has been held admissible to show in which one of these several capacities he actually signed.³⁰

In the numerous jurisdictions where the Uniform Negotiable Instruments' Law has been adopted, further serious doubt and controversy on this subject is practically foreclosed by the following provisions:

"A person placing his signature on an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appro-

29. See Post, sec. 226.

30. No attempt is made here to cite, much less to reconcile, the many conflicting authorities on this point or to follow their reasoning. See Bigelow on Bills, Notes & Cheques (2nd Ed.), 46; Ogden, Neg. Ins., pp. 89, 93 et seq.; 7 Cyc. 664, and article in 23 Harv. Law Rev.; Fullerton v. Hill, 48 Kan. 558, and notes thereto in 18 L. R. A. 33, and to Cadwallader v. Hirschfield, 62 N. J. L. 747 in 72 Am. St. R.

priate words his intention to be bound in some other capacity." ³¹

"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." ³²

§ 7. Suretyship or Insurance—Compensated Corporate Suretyship. The distinction between suretyship or guaranty and certain forms of insurance, is shadowy and indistinct. This is notably true of so-called contract insurance, fidelity insurance, and credit indemnity insurance, and contracts of this class have been construed as policies of insurance rather than as strict suretyships or guarantees, and are treated of as insurance policies in works on insurance when issued in due course of business by corporations chartered for the purpose of writing them,³³ though from the very nature of the risk

676; *Kissire v. Plunkett-Jarrell Grocer Co.*, 102 Ark. —, 145 S. W. 567; *Lyons Lumber Co. v. Stewart*, 147 Ky. 653.

31 See *Lyons Lumber Co. v. Stewart*, *supra*; *Pugh v. Sample* 123 La. 791, 39 L. R. A. (N. S.) 834.

32. New York Neg. Law, secs. 70, 71.

The above provisions obviously apply to the indorsement of such instruments only as are negotiable under the act, leaving open the question of the liability of a stranger who indorses a non-negotiable instrument. In some states he appears to be bound as an original promisor, in others as an absolute guarantor, in others as a conditional guarantor of payment, in others as an indorser under the law merchant, and in some there is no presumptive liability and the intention of the parties is matter for parol evidence. See 18 L. R. A. 34, note; *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. R. 94, 98 and note; *Smith v. Meyers*, 107 Ill. App. 410, affirmed in 207 Ill. 126.

33. See *Richards on Ins.* (3rd Ed.), secs. 468, 469; *Frost Guar. Ins.* (2nd Ed.), sec. 3; *Post*, sec. 93, and cases cited.

and the situation of the parties they also involve the application of suretyship principles, and the contract itself takes the form of a bond rather than an ordinary policy of insurance, though in many of its features it resembles the latter.³⁴ Indeed both suretyship and insurance cases are liberally cited and relied upon by the courts and text-writers in cases involving these "*surety bonds*" as they are commonly called.

The surety and the insurer of property, however, have this in common; that either, having indemnified the principal for loss, is entitled to be subrogated to the rights of the creditor or insured against third persons legally answerable in the first instance to the obligee or the insured for occasioning such loss.³⁵ And in England, and to a limited extent in this country, the idea that an insurer is in the position of a surety as respects subrogation, has been pressed so far that the courts have held him subrogated to contract rights and remedies against others tending to diminish the loss. Thus an insurer has been held subrogated to the rights of a landlord under his tenant's covenant to rebuild.³⁶ The weight of American authority in the absence of special contract, however, seems to confine the insurer's right of subrogation to those primarily liable for the loss.³⁷

34. The relationship between the surety company and the "risk" who signs the bond as "principal," is distinctly that of principal and surety. See *Rice v. Fidelity & Dep. Co.*, 103 Fed. 427, 43 C. C. A. 270; *Guaranty Co. of N. A. v. Geddes*, 22 Fed. 639; *March v. Fid. & Dep. Co.*, 79 Md. 309.

35. *Richards on Ins.* (3rd Ed.), secs. 52, et seq.; *Chicago & Alton R. R. Co. v. Glenn*, 175 Ill. 238; *Wunderlich v. Chicago, etc. Ry. Co.*, 93 Wis. 132. See *March v. Fidelity & Dep. Co.*, supra, as to the right of indemnification between the company and the "risk" in fidelity insurance.

36. *Darrell v. Tibbitts*, L. P. 5, Q. B. D. 560. See also, *Castellain v. Preston*, L. R. 11, Q. B. D. 380; *Phoenix Ins. Co. v. Spooner*, L. R. (1905), 2 K. B. 753; *Liverpool, etc. Co. v. Phenix Co.*, 129 U. S. 397, 462.

37. *Michael v. Insurance Co.*, 171 N. Y. 25. See *Foley v. Ins. Co.*, 152 N. Y. 131, 134, 43 L. R. A. 664; *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. D. 425-n; *International Trust Co. v. Boardman*, 149 Mass. 153, 161.

In fidelity, contract and credit insurance the right of subrogation to the rights, remedies and collaterals of the insured against the principal clearly exists upon the principles both of suretyship and of insurance, regardless of any express provision in the contract;³⁸ and where the statements of the written application for such insurance are declared warranties or conditions they will be deemed such and will be given the same general effect as warranties or conditions in other forms of insurance.³⁹

Corporate sureties are ordinarily entitled to the benefit of such provisions of statute as are meant for the protection and relief of sureties generally, unless such sureties are expressly or by fair and reasonable intentment placed outside the pale of their protection.⁴⁰

§ 8. Where Suretyship Relation Unknown to Creditor at Time of Contracting or Arises Subsequently—Assumption by Partner of Firm Debts. Though co-promisors or co-debtors may at the outset sustain the relation of principal and surety inter se, the fact that one of them is a surety may be unknown to the creditor, or those who are originally principals inter se may subsequently change their relations so that one or some of them become mere sureties. Whether, and to what extent under these circumstances, the creditor is bound in his subsequent dealings with the principal to recognize the rights of the surety or sureties as such, is a question upon which there has been much discussion, and upon which the authorities are at some points conflicting.

It appears to be settled, however, that where joint promisors occupy the position of principal and surety at

38. *Lewis v. U. S. Fid. & Guar. Co.*, 144 Ky. 425, Ann. Cas. 1913a, 564, 565, and note; *London, etc. Co. v. Geddes*, 22 Fed. 639; *New York Fidelity Co. v. Eickhoff*, 63 Minn. 170, 56 Am. St. R. 464, 30 L. R. A. 586; *Frost Guar. Ins.* (2nd Ed.), secs. 280, 281. A corporate compensated surety is entitled to contribution from an individual accommodation surety. *U. S. Fid. & Guar. Co. v. McGinnis*, 147 Ky. 781.

39. Post, secs. 52 et seq. *Am. Bonding & Trust Co. v. Burke*, 36 Col. 49; *Livingston v. Fidelity & Deposit Co.*, 76 Oh. St. 253.

40. *Am. Surety Co. v. Thurber*, 162 N. Y. 244. See *Bank of Tarboro v. Fid. Co.*, 128 N. Car. 908, 83 Am. St. R. 682.

the outset, though the fact is unknown to the creditor, he is bound the moment he has notice of the fact to treat the surety as such, and any extension of time thereafter granted to the principal without the consent of the surety, will release the latter under rules stated later on.⁴¹

But where the relation between co-promisors is subsequently changed by agreement between them from that of principal debtors to that of principal and surety, the authorities are divided as to whether the creditor, upon notice of this change, must respect the changed relation in his dealings with the principal. The common case is where a partner retires and the remaining partner agrees to assume and pay the partnership debts. The authorities agree in such cases that the retiring partner is, as to the partners assuming the firm debts, a surety merely, and entitled to indemnity from the latter if he is compelled to pay such debts.⁴²

One line of authorities, reasoning that since one originally a surety as to his co-promisor, can compel the creditor to treat him as a surety after such creditor has notice of the suretyship, the firm creditors after notice of this arrangement, are bound to deal with the partner who has subsequently assumed the firm debts with strict reference to the rights of the retiring partner as a surety, whether they assent to such arrangement or not.⁴³

41. Post, secs. 225 et seq. *Rouse v. Bradford Banking Co.*, L. R. (1894) App. Cas. 586, 592, and cases cited; *McAraavy v. Magril*, 123 Ia. 605, 608; *Sharpleigh v. Wells*, 90 Tex. 110, 59 Am. St. R. 783; *Rawson v. Taylor*, 30 Oh. St. 389, 27 Am. R. 464; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386.

42. *Wendlandt v. Sohre*, 37 Minn. 162; 3 Pom. Eq. Jur., secs. 1417, 1418. Of course, if the creditor agrees to release the outgoing partner and hold the remaining ones alone, there is a complete novation and no question of suretyship arises. See generally as to assumption of debts upon dissolution of partnership 9 L. R. A. (N. S.) 49 and note.

43. *Rouse v. Bradford Banking Co.* L. R. (1894) App. Cas. 586, 592, citing *Oakley v. Pascheller*, 4 Cl. & F. 207, 10 Bligh N. R. 548, and overruling *Swire v. Redman*, 1 Q. B. D. 536; *Smith v. Shelden*, 35 Mich. 42, 24 Am. R. 529; *Preston v. Garrard*, 120 Ga. 689, 102 Am. St. R. 124; *Wiley v. Temple*, 85 Ill. App. 69; *Barber v. Gillson*, 18 Nev. 89; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. R. 90; *Millerd v. Thorn*, 56 N. Y. 402; *Lazelle v. Miller*, 40 Or. 549; *Gourley v. Tyler* (Tex.

Another line of decisions denies to the retiring partner the rights of a surety against firm creditor under such circumstances, and holds that the partners, being originally bound as principals, cannot, by agreement between themselves, change their relations to those of principal and surety so as to affect the rights and duties of firm creditors, unless with the consent of the latter. As to them such agreement is *res inter alios acta*.⁴⁴ It has been held in a few cases, however, that while the creditor is not bound, even after notice, to respect the rights of the retiring partner as a strict surety, he is nevertheless bound in equity to exercise good faith and reasonable diligence in enforcing his rights against the partner who has assumed the firm debts, and his failure to do so will release the retiring partner, not absolutely, but to the extent of any injury actually suffered by him in consequence of the creditors want of diligence and good faith.⁴⁵

§ 9. Real Suretyship-Mortgage or Pledge to Secure Another's Debt—Wife's Mortgage for Husband's Debt. If property, real or personal, of one person is pledged or mortgaged to secure the debt of another, such property occupies the position of a surety, and whatever act of

1891), 15 S. W. Rep. 731. See also *Conwell v. McCowan*, 81 Ill. 285; *Savage v. Putnam*, 32 N. Y. 501; *Burnside v. Fetzner*, 63 Mo. 107; *Gillen v. Peters*, 39 Kan. 489; *Chandler v. Higgins*, 109 Ill. 602; *Wendt-lant v. Sohre*, 37 Minn. 162; *Brill v. Hoile*, 53 Wis. 537; *Webster v. Lawson*, 73 Wis. 561. Compare *Barnes v. Boyers*, 34 W. Va. 303; *Oakley v. Pascheller*, 10 Bli. (N. S.) 548; *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 185; *Campbell v. Floyd*, 153 Pa. St. 83, 94.

44. *Harris v. Lindsay*, 4 Wash. C. C. 98; *McAreavy v. Magril*, 123 La. 605; *Hall v. Jones*, 56 Ala. 493; *Dean & Co. v. Collins*, 15 N. D. 535, 9 L. R. A. (N. S.) 49, 125 Am. St. R. 610; *Rawson v. Taylor*, 30 Oh. St. 389, 27 Am. Rep. 464; *Sharpleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. R. 783; *White v. Boone*, 71 Tex. 712; *Buchanan v. Clark*, 10 Grat. (Va.) 164; *Barnes v. Boyers*, 34 W. Va. 303; *Tootle v. Cook*, 4 Col. App. 111. See also, *First Nat. Bank v. Finck*, 100 Wis. 447, 451, and as to suretyship by assumption of mortgage debt, *Post*, sec. 10, and cases cited in note 57.

45. *Grotte v. Wiel*, 62 Neb. 478; *Rawson v. Taylor*, 30 Oh. St. 389, 27 Am. R. 464.

the creditor will discharge a personal surety will ordinarily discharge such property, provided the surety has knowledge of the facts,⁴⁶ and if his property be taken to satisfy the debt, he may recover indemnity from the party whose debt it primarily was,⁴⁷ and an unauthorized extension of time to the creditor will release the property pledged or mortgaged as it would a personal surety.⁴⁸

Where property of one who is not personally bound therefor is thus made security for the debt of another, the term *real suretyship*, as we have seen, is sometimes used to describe the transaction.⁴⁹

Though in many states a wife is incompetent to bind herself personally as surety, she may usually pledge or mortgage her separate property for the debt of her husband or another,⁵⁰ and such property will then stand in the attitude of a surety, and will be discharged by whatever would discharge a personal surety, as against a creditor with knowledge of the facts.⁵¹ It has furthermore been held that where the creditor knows that the mortgagor is a married woman and that the property

46. *Robinson v. Gee*, 1 Vesey Sr. 251; *Royal Canadian Bank v. Payne*, 19 Grant's Ch. 180; *Denison v. Gibson*, 24 Mich. 187; *Lord Haberton v. Bennett, Beatty* (Ir. Ch.) 386; *Bowker v. Bull*, 1 Simons (N. S.) 29; *White v. Ault*, 19 Ga. 551; *Price et al. v. Dime Savings Bank*, 124 Ill. 317, and cases cited in the opinion and in the note to that case in 7 Am. St. R. 367.

47. In *Exall v. Partridge*, 8 Term. R. 308, the plaintiff's goods being lawfully upon the land of a tenant, were distrained and sold for rent. The tenant was liable to the plaintiff.

48. Post, sec. 225. *Allen v. O'Donald*, 28 Fed. Rep. 346; *Campion v. Whitney*, 30 Minn. 177; *Walker v. Goldsmith*, 7 Oreg. 161, and cases cited. *Rowan v. Sharp's Rifle Co.*, 33 Conn. 1.

49. Ante, sec. 1. *Rowan v. Sharp's Rifle Co.*, supra.

50. See Post, sec. 21; *Gall v. Fehr*, 131 Wis. 141.

51. See *Spencer Dom. Rel.*, sec. 251; *Cross v. Allen*, 141 U. S. 528 and authorities cited; *Post v. Losey*, 111 Ind. 74, 60 Am. R. 677; *Moffett v. Roche*, 77 Ind. 48, 51, and cases cited; *Bank of Albion v. Burns*, 46 N. Y. 170. See also, *Hodgson v. Hodgson*, 2 Keen 704; *Wheelwright v. DePeyster*, 4 Edw. Ch. (N. Y.) 232; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Niemcewicz v. Gahn*, 3 Paige (N. Y.) 614; *Vartile v. Underwood*, 18

mortgaged is her separate estate, he is bound to ascertain, if he may by reasonable inquiry from her, whether the debt secured is her own or that of another.⁵² But these rules appear to be confined to the wife's separate estate, and her joinder in the husband's mortgage to release her dower or homestead rights does not put her in the position of a surety as to them.⁵³ Furthermore when the property of the principal and of a surety (whether a wife or a stranger) are both transferred as security for a debt, the surety may ordinarily insist that the property of the principal be first resorted to in satisfaction.⁵⁴

§ 10. Suretyship by Assumption of Mortgage Debt.

Where the vendee of lands assumes and agrees with his vendor to pay a mortgage existing on the land at the time of the execution of the deed, he becomes, as to the mortgagor at least, the principal debtor, the mortgagor and vendor is in the position of a surety, and the creditor having knowledge of the assumption must, by the great weight of authority, deal with the parties accordingly.⁵⁵

It is even held that where land is purchased subject to a mortgage without any assumption of the mortgage

Barb. (N. Y.) 561; Hubbard v. Ogden, 22 Kan. 363; Wiel & Bros. v. Thomas, 114 N. Car. 197; Diehl v. Davis, 75 Kan. 38; Hackfield & Co. v. Metcalf, 20 Hawaii 47, Am. Ann. Cas. 1912, D 108 and note; Knight v. Whitehead, 26 Miss. 245; Johns v. Reardon, 11 Md. 465; Dennison v. Gibson, 24 Mich. 187; Christian v. Keen, 80 Va. 369; Purvis v. Carstaphan, 73 N. Car. 575; Hood v. Jones, 5 Del. Ch. 77; 1 Lead. Cas. in Eq. (3rd Am. Ed.), pp. 591, 594, notes. But see Sav. Fund Soc. v. Lasher, 144 Ill. App. 653; Alexander v. Bouton, 55 Cal. 15.

52. Post v. Losey, *supra*. See also, Guy v. Lieberenz (Ind.), 64 N. E. 527; Bank of Albion v. Burns, *supra*; (notice from the record); Smith v. Townsend, 25 N. Y. 479.

53. Jenness v. Cutler, 12 Kan. 500. Compare Dawson v. Bank, 4 Ch. Div. 639.

54. Post, sec. 179.

55. 1 Brandt Sur. & Guar. (3rd Ed.), sec. 47; Murray v. Marshall, 94 N. Y. 611; Calvo v. Davies, 73 N. Y. 211, 29 Am. R. 130; George v. Andrews, 60 Md. 26, 45 Am. R. 706; Home Nat. Bank v. Waterman, 134 Ill. 461, 467; Palmeto v. Carey, 63 Wis. 426; Klapworth v. Dressler, 2 Beasley's Ch. (N. J.) 62, 78 Am. D. 69, 72, and note.

S. S. 2

debt as a personal liability, the land being the primary fund for the payment of the debt, the grantor stands in the situation of a surety and has a right to have it applied to his exoneration at the maturity of the debt, or to pay the debt and be subrogated to the rights of the mortgagee, and hence that an extension of time given to the grantee by the creditor, with knowledge of the conveyance and without the consent of the grantor, releases him to the extent of the value of the mortgaged property.⁵⁶

But it is held by some courts that not even an express assumption of the mortgage debt by a grantee will give the grantor the rights of a surety as against the mortgagee, unless he assents to the arrangement,⁵⁷ and that the mortgagee cannot, in the absence of such assent, sue the grantee at law for the debt so assumed.⁵⁸

But in most states the mortgagee may sue at law a grantee of mortgaged premises who has expressly assumed and agreed with his grantor to pay the mortgage debt, even though the mortgagee is not a party to such agreement. This is upon the theory that the assumption of such debt constitutes the mortgagee the beneficiary of the contract between the mortgagor and his grantee in which the mortgagor becomes a surety and his grantee the principal debtor, and that any unauthorized extension of time to the grantee, after notice of such assumption, will discharge the mortgagor from all personal liability,⁵⁹ and so of any other material alteration under

56. *Murray v. Marshall*, *supra*; *Travers v. Dorr*, 60 Minn. 173, commenting on *Shepherd v. May*, 115 U. S. 505, and *Keller v. Ashford*, 133 U. S. 610. See also as sustaining the same principle, *Metz v. Todd*, 36 Mich. 473; *Dederick v. Bleyker*, 85 Mich. 475, 482.

57. See *Shepherd v. May*, 115 U. S. 505; *Willard v. Wood*, 135 U. S. 309; *Keller v. Ashford*, 133 U. S. 610, 625; *Chilton v. Brooks*, 72 Md. 554, with which compare *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 190; *Re Errington*, *Ex. p. Mason* (1894), 1 Q. B. 11, 14; *Warring v. Ward*, 7 Ves. 332, 337.

58. *Willard v. Wood*, *supra*.

59. *Union Life Ins. Co. v. Hanford*, 143 U. S. 187, 190; *Home National Bank v. Waterman*, 134 Ill. 461, 467; *Brosseau v. Lowry*, 209 Ill. 405; *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. R. 602; *Calvo v. Da-*

the same circumstances of the contract between the creditor and the vendee.⁶⁰

A grantee who assumes and agrees to pay the mortgage debt is, by most authorities, personally liable to a deficiency judgment, and no agreement between such grantee and his grantor will impair this liability, at least after the mortgagee has notice of it and has assented to it.⁶¹

§ 11. Assignor of Lease as Surety. Where a tenant assigns his entire term, even with the consent of the landlord, unless the transaction amounts to a surrender of the original term and a new lease to the assignee, the tenant and his sureties nevertheless remain bound by his express covenants in the lease, and it makes no difference that the landlord has accepted rent from the assignee. The assignee, however, may be held for breach of such covenants on account of his privity of estate. In fact, as against the assignor at least, he is deemed to be the principal as long as he continues in possession, and the assignor is merely his surety.⁶²

§ 12. Stockholders in Corporations as Sureties with Respect to Statutory Liability. Where a constitutional, statutory or charter provision makes the stockholders of a corporation personally liable for its debts it has been held that they are, as to the liability so created, in the attitude of sureties for it and are released by such acts

vies, 73 N. Y. 211, 29 Am. R. 130; *Germania Life Ins. Co. v. Casey*, 98 App. Div. (N. Y.) 88; *Iowa Loan & Trust Co. v. Haller*, 119 Ia. 645. See also *Poe v. Dixon*, 60 Oh. St. 124, 71 Am. St. R. 713.

60. *New York Life Ins. Co. v. Casey*, 178 N. Y. 381.

61. *Commercial Nat. Bank v. Kirkwood*, 172 Ill. 563. That no assent is necessary in such cases see *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. R. 1003, where authorities on the several phases of this question are cited.

62. See *Wood Land & Ten.*, sec. 350; *Brostman v. Kramer*, 135 Cal. 36; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. R. 248; *Washington etc. Co. v. Johnson*, 123 Pa. St. 576, 10 Am. St. R. 553, 557, and note; *Fifty Associates v. Grace*, 125 Mass. 151. See and compare *Latta v. Weis*, 131 Mo. 230; *Page v. Ellsworth*, 44 Barb. (N. Y.) 636; *Baynton v. Morgan*, 22 Q. B. D. 74.

or omissions on the part of the creditor, as by an extension of time to the corporation and the like, as will release sureties in other cases, and such stockholders are entitled, like other co-sureties, to contribution *inter se*.⁶³ If the liability imposed for corporate debts is penal rather than contractual, however, a shareholder satisfying such liability is not entitled to contribution from his fellow stockholder, at least in another state.⁶⁴

In at least one state a double stock liability created by statute has been held to make the shareholders liable to corporate creditors as guarantors of collection, where the statute provided that the personal liability of shareholders should arise only after judgment against the company and a return of execution *nulla bona*.⁶⁵

§ 13. Co-debtors as Sureties. There is always some suretyship relation between joint debtors or joint and several debtors. If one or some of them have undertaken for the mere accommodation of their fellow or fellows, they are sureties for the latter in the strict and technical sense of the term,⁶⁶ and the creditor must ordinarily respect their rights as such, if he has notice of them, under principles already discussed.⁶⁷

Even when co-promisors are all beneficially interested in the debt in aliquot proportions or otherwise, each is liable for the whole debt and each is a principal so

63. *Hanson v. Donkersley*, 37 Mich. 184, followed in *Harpold v. Stobart*, 46 Oh. St. 397, 15 Am. St. R. 618, sustaining the right to contribution on the part of a stockholder held liable under such a statute. See also, *Pacific Elevator Co. v. Whitebeck*, 63 Kan. 102, 88 Am. R. 229, and authorities cited; *Aspinewall v. Sacchi*, 54 N. Y. 331; 3 *Thompson Corp.*, sec. 3816. Compare *Zane on Banks & Banking*, sec. 63, and see 3 Am. St. R. 848, note, showing that the suretyship theory in such cases is generally repudiated. Its repudiation, however, would not seem to militate against the right of contribution. See 3 Am. St. R. 870, note.

64. *Sayles v. Brown*, 40 Fed. 8. Compare *Allen v. Fairbanks*, 45 Fed. 445.

65. *Ball Electric Light Co. v. Child*, 68 Conn. 522. See also *Kinton, Warren & Co. v. Providence Tool Co.*, 22 R. I. 605.

66. *Ante*, sec. 3.

67. *Ante*, sec. 8.

far as his own share is concerned, and a surety *sub modo* for the other co-debtors, so far as they are equitably bound to reimburse him who pays beyond his just proportion of the common obligation. Upon this theory a joint or joint and several debtor who pays the entire debt is entitled to be subrogated to all securities that the creditor holds from any of his fellows to enforce the right of contribution against them.⁶⁸ But though the release of one joint or joint and several debtor will release his fellows at common law⁶⁹ merely giving time to one of them will not release his co-promisors unless they are technically his sureties and the creditor knows them to be such.⁷⁰ But where one joint promisor is really a surety for his fellows, though his suretyship does not appear on the face of the instrument, a valid extension of time granted to the principal debtor by the creditor with knowledge of the suretyship will, by the weight of authority, release the surety unless he consents.⁷¹ In the case of commercial paper, however, under the peculiar wording of the Uniform Negotiable Instruments Act, the contrary has been held with respect to accommodation acceptor, maker or co-maker.⁷²

68. *Crafts v. Mott*, 4 N. Y. (Comst.) 604; *Chipman v. Morrell*, 20 Cal. 130; *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557, and note; *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; *Stokes v. Hodges*, 11 Rich. Eq. (S. Car.) 135; Post, sec. 169.

69. Post, sec. 241. The release is only to the extent of the contributory share in some states under statutes. See Post, sec. 241.

70. *Neal v. Harding*, 2 Met. (Ky.) 247, 250; *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; *Parsons v. Harrold*, 46 W. Va. 122. See *Draper v. Weld*, 13 Gray (Mass.) 580; Ante, sec. 8; Post, sec. 241.

71. Ante, sec. 8; Post, sec. 236.

72. Post, sec. 226.

CHAPTER II.

OF THE CONSIDERATION FOR THE SURETYSHIP UNDERTAKING.

§ 14. **In General—Suretyship by Specialty.** The undertaking of a guarantor or surety, if in the form of a simple contract, must have a consideration to support it.¹ The only exception to this rule is that if the contract be negotiable under the rules of the law merchant, it is good in the hands of a bona fide holder for value, though entered into without consideration.²

Where the contract of the surety or guarantor is by specialty, however, it needs no consideration to support it at common law,³ though if there be a consideration for it in fact, its illegality may be pleaded and proved as a defense.⁴ But in several states the whole law as to sealed contracts has been changed, so that a consideration is necessary to support any executory contract though

1. 1 Brandt Sur. & Guar. (3rd Ed.), secs. 4, 22; *Wain v. Warlters*, 5 East 10; *Pillans v. Van Mierop*, 3 Burr 1664; *Moses v. Lawrence County Bank*, 149 U. S. 298; *Elliott v. Giese*, 7 Har. & J. 457; *Leonard v. Vredenburg*, 8 John. (N. Y.) 29, 5 Am. D. 317n; *Bailey v. Freeman*, 4 John. (N. Y.) 280; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Tenney v. Prince*, 4 Pick (Mass.) 385, 16 Am. D. 332; *Cobb v. Page*, 17 Pa. St. 469; *Union Bank v. Coster's Executors*, 3 N. Y. 203, 53 Am. D. 280; *Jackson v. Jackson*, 7 Ala. 791; *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. R. 46, 4 L. R. A. 680, and cases throughout this chapter. Statutory obligations are usually binding without consideration if entered into as the statute authorizes or directs. In cases within the statute of frauds, however, not only must there be consideration but in many states the consideration must be expressed. Post, secs. 86, 87.

2. See Post, chap. X., where the negotiability of contracts of suretyship and guaranty is considered. See *Moses v. Lawrence Co. Bank*, 149 U. S. 298.

3. Brandt Sur. & Guar., supra; *Ericson v. Brandt*, 53 Minn. 10; *Shackamaxon Bank v. Yard*, 143 Pa. 129, 139.

4. Post, sec. 58; *Fallowes v. Taylor*, 7 Term R. 471.

it actually bears a seal. In some of them a seal is presumptive evidence of a consideration, while in others all written contracts are presumed to be upon sufficient consideration until the contrary is shown, thus placing simple and sealed contracts in writing upon an equal footing.⁵ Even where the common law prevails, a contract insufficient as a specialty may, if entered into upon a valuable consideration, be upheld as a simple contract in the absence of some statutory obstacle.⁶

§ 15. When Consideration for Principal's Undertaking Supports that of Surety, or Guarantor. Bearing in mind the elementary principle of modern law that consideration may consist either in a benefit to the promisor or a detriment to the promisee,⁷ if credit be given to the principal at or after the time when the guarantor consents to be bound, the credit given to the principal or the consideration moving to him at the express or implied request of the guarantor or surety will support the latter's undertaking, as where money is advanced or goods are delivered to the principal upon credit, or he is taken into the employ of the creditor or obligee at or after the time when the guaranty is made and on the faith of it,⁸ or a

5. See Stimp *Am. St. L.*, sec. 4121. Where a statute declares a seal presumptive evidence of consideration it has been held that parties are absolutely bound by a specialty if they intend to be bound though there is no consideration in fact. *United, etc. Co. v. Conard*, 80 N. J. L. 286, Ann. Cas. 1912 A 412. See also, *Montgomery Co. v. Auchey*, 103 Mo. 492.

6. *Saline County v. Sappington*, 64 Mo. 72; *First Nat. Bank v. Briggs*, 69 Vt. 12, 60 Am. St. R. 922.

7. *Currie v. Misa*, L. R. 10 Ex., p. 162; *Clark's Appeal*, 57 Conn., p. 572; *Hamer v. Sidway*, 124 N. Y., pp. 538, 545, 21 Am. St. R. 693, 12 L. R. A. 463n; *Ballard v. Burton*, 64 Vt. 387, 394, 16 L. R. A. 664; *Irwin v. Webster*, 56 Ohio St. 9, 20, 60 Am. St. R. 727, 36 L. R. A. 239, and cases cited in the note below.

8. *White v. Woodward*, 5 C. B. 810; *Boyd v. Moyle*, 2 C. B. 644; *Offord v. Davies*, 12 C. B. (N. S.) 747; *Bainbridge v. Wade*, 1 E. L. & E. 236; *Leonard v. Vredenburgh*, 8 John. (N. Y.) 29, 5 Am. D. 317; *Good v. Martin*, 95 U. S. 90; *Moses v. Lawrence Co. Bank*, 149 U. S. 298; *Bickford v. Gibbs*, 8 Cush. (Mass.) 156; *Campbell v. Knapp*, 15 Pa. St. 27; *Klein v. Currier*, 14 Ill. 237; *Parkhurst v. Vail*, 73 Ill. 343; *Gibbs v. Blanchard*, 15 Mich. 292; *Kurtz v. Adams*, 7 Eng. (Ark.)

contract for particular work is let to the principal on condition that the guarantor or surety will become bound.⁹

§ 16. Same—Past Consideration—Surety for Obligation Previously Contracted. Where the principal obligation was fully incurred before the undertaking of the guarantor or surety is entered into, however, the consideration, in order to sustain the guaranty, must be a new and distinct one of benefit to the guarantor or surety or detriment to the creditor.¹⁰ But though the contract of the guarantor is executed subsequently to that of the principal debtor, if it was so executed pursuant to an agreement with the surety antedating or contemporaneous with the principal's contract, it is upon sufficient consideration;¹¹ and where the plaintiff lent money and accepted the borrower's note under an agreement that the maker would procure another to sign it as surety if the creditor should deem himself insecure or should de-

174; *Henderson v. Rice*, 1 Coldw. (Tenn.) 223; *Young v. Brown*, 33 Wis. 333. See the note in 105 Am. St. R., p. 509 and cases throughout the next two sections.

9. *Smith v. Molliesson*, 74 Hun 606, 26 N. Y. Supp. 653.

10. 1 Brandt Sur. & Guar. (3rd Ed.), sec. 26; *Simmons v. Want*, 2 Starkie 371; *Eastwood v. Kenyon*, 11 A. & E. 438; *Crofts v. Beale*, 11 C. B. 172; *Raband v. D'Wolf*, 1 Paine C. C. (U S) 580; *Anderson v. Davis*, 9 Vt. 136, 31 Am. D. 612; *Parker v. Parker*, 2 Met. (Mass.) 423; *Elliott v. Giese*, 7 Har. & J. (Md.) 457; *Ware v. Adams*, 24 Me. 177; *Leonard v. Vredenburg*, supra; *Jackson v. Jackson*, 7 Ala. 391; *Savage v. First Nat. Bank*, 112 Ala. 508; *Yale v. Edgerton*, 14 Minn. 194; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. R. 629; *Martin v. Stubbings*, 20 Ill. App. 381; *White v. White*, 30 Vt. 338; *Bray v. Parcher*, 80 Wis. 16, 27 Am. St. R. 17. See *Kirby & Eccles Case*, 1 Leonard 186, part 1.

Where it is uncertain on the face of a written contract of guaranty whether it refers to a past or prospective credit, parol evidence of the situation of the parties is admissible in aid of the interpretation. *Polk Printing Co. v. Smedley*, 155 Mich. 249. See Post, sec. 65.

11. *Paul v. Stackhouse*, 38 Pa. St. 302; *Pauly v. Murray*, 110 Cal. 13, and cases cited; *Sawyer v. Fernald*, 59 Me. 500. See *Roberts v. Woven Wire Mattress Co.*, 46 Md. 374; *Lachey v. Boruff*, 152 Ind. 371; *Kissire v. Plunkett-Jarrell Grocer Co.*, 102 Ark. —, 145 S. W. 567; *Deposit Bank v. Peak*, 110 Ky. 579, 96 Am. St. R. 466. See also, *De Matos v. Jordan*, 15 Wash. 378.

sire further security, and the note was subsequently returned to the maker with the request that he obtain a surety, it was held that the original agreement upon which the money was lent was a sufficient consideration to support the surety's undertaking;¹² and if, in consideration of a present or future credit given to the principal, the guarantor undertakes for that and also for a debt already incurred by the principal, or for the latter debt alone, the consideration is sufficient to support the entire guaranty, or the guaranty of the prior debt.¹³ Furthermore, though the promise of the guarantor or surety was made after the principal obligation was fully incurred, any new consideration of benefit to the guarantor or detriment to the creditor, however slight, will suffice. Thus a consideration of one dollar will support the most onerous undertaking of guaranty.¹⁴

§ 17. Same—Extension of Time or Forbearance in Favor of Principal—Abandonment of Rights. Though credit has already been given to the principal without any promise of guaranty or suretyship, an agreement by the creditor definitely extending the time of payment or performance or otherwise definitely to forbear to exercise legal rights against the principal, is a sufficient consideration for the undertaking of the guarantor or surety, upon the familiar ground that the creditor has suffered a detriment at the request of the guarantor in relinquish-

12. *McNaught v. McClaughrey*, 42 N. Y. 22, 1 Am. R. 487. See *Moies v. Bird*, 11 Mass. 436, 6 Am. D. 179, to the same point. See also, *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Smith v. Mollison*, 148 N. Y. 241.

13. *Boyd v. Moyle*, 2 Com. B. 644; *Clune v. Ford*, 55 Hun (N. Y.) 479, 8 N. Y. Supp. 719; *Badgley v. Moulton*, 42 Vt. 184; *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. R. 845. See *Oldershaw v. King*, 2 H. & N. 517. Compare *Westhead v. Spronson*, 6 H. & N. 728.

14. *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Davis v. Wells Fargo Co.*, 104 U. S. 159; *Taylor v. Wightman*, 51 Ia. 411; *Furst v. Bradley*, 111 Ind. 308. The release of a substantial security for a subsisting debt is sufficient consideration for the guaranty of a third party, whether the guarantor has any interest therein or not. *Killian v. Ashley*, 24 Ark. 511, 91 Am. D. 519.

ing his legal right to proceed against the principal.¹⁵ And so of an agreement to forbear a reasonable time;¹⁶ and though there be no promise for a definite extension of time to the principal, the creditor's actual forbearance for a reasonable time, at the express or implied request of the guarantor, to pursue his remedies against the principal, is, by the weight of authority, a sufficient consideration for the guarantor's undertaking;¹⁷ and so if the creditor in consideration of the guaranty abandons legal proceedings actually commenced against the principal, though he does not bind himself not to bring new proceedings;¹⁸ and so if the creditor in consideration of the promise of the guarantor surrenders or releases

15. *Sadler v. Hawkes*, 1 Rolle. Abr. 27, pl. 49; *Tricket v. Mandlee*, Sid. 45; *Harris v. Venables*, L. J. 7 Exch. 235; *Breed v. Hillhouse*, 7 Conn. 523; *Thompson v. Gray*, 63 Me. 228; *Sage v. Wilcox*, 6 Conn. 81; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Faulkner v. Gilbert*, 57 Neb. 544; *McKee v. Needles*, 123 Ia. 195. Taking a note with surety maturing later than an antecedent debt of the principal, is *prima facie* an extension of time to the principal until maturity of the new note. See *Thompson v. Gray*, *supra*; *Hannay v. Moody*, 31 Tex. Civ. App. 88. See also Post, sec. 239.

16. *Johnson v. Whitcrott*, 1 Rolle Abr. 24, pl. 33; *Walker v. Sherman*, 11 Metc. (Mass.) 170, 172, and cases cited; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85, 88; *Hakes v. Hotchkiss*, 23 Vt. 231; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. R. 593; *Lonsdale v. Brown*, 4 Wash. (C. C.) 148; *Downing v. Funk*, 5 Rawle (Pa.) 69; *Watson v. Randall*, 20 Wendel (N. Y.) 201; *Sidwell v. Evans*, Rawle's Pen. & W. 383; *Insurance Co. v. Smith*, 23 Hun (N. Y.) 535; *Citizens Savings Bank & Trust Co. v. Babbitt's Estate*, 71 Vt. 182. A promise to forbear or forbearance for "a little," or "a short time" is not sufficient. *Strong v. Sheffield*, 144 N. Y. 392; *Lonsdale v. Brown*, *supra*.

17. *Pafford v. Webb*, 2 Rolle 88; *Map v. Sidney Cro. Jac.* 683; *Oldershaw v. King*, 2 H. & N. 517; *Wynne v. Hughes*, 21 Wkly. Rep. 628; *Crears v. Hunter*, L. R. 19 Q. B. D. 341; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *King v. Upton*, 4 Me. (Greene) 387, 16 Am. D. 266; *Wills v. Ross*, 77 Ind. 1, 40 Am. R. 279; *Strong v. Sheffield*, *supra*; *Hakes v. Hotchkiss*, 23 Vt. 231; *Thomas v. Croft*, 2 Rich. L. (S. Car.) 113; *Howe v. Taggart*, 133 Mass. 288; *Cooper v. Jackson*, 22 Ky. L. 295; *United, etc. Co. v. Conard*, 80 N. J. L. 286, Ann. Cas. 1912 A 410; *Ballard v. Burton*, 64 Vt. 387, 16 L. R. A. 664. *Contra*, *Semple v. Pink*, 1 Exch. 74 (semble), criticised in *Oldershaw v. King*, *supra*.

18. *Harris v. Venables*, L. R. 7 Exch. 235. See also, *Buffington v. Bronson*, 61 Oh. St. 231; *Mutual Life Ins. Co. v. Smith*, 23 Hun (N. Y.) 535.

any other right, security or valuable thing whatsoever, whether in favor of the principal, the guarantor or a stranger.¹⁹

§ 18. Same—Voluntary Forbearance against Principal Insufficient. It is agreed by all the authorities, however, that mere voluntary forbearance by the creditor, without request on the part of one who subsequently signs as guarantor or surety, is no consideration for the undertaking of the latter. It is no more than a voluntary courtesy to the debtor, and like any other past consideration will not support a contract.²⁰

§ 19. Failure of Consideration—Conditions Precedent. Where the consideration for the principal undertaking has failed in whole or in part, this will ordinarily be a defense to an action against the surety to the same extent that it would be available to the principal.²¹

Where the surety's undertaking is based upon the forbearance of the creditor against the principal for a given time, such forbearance is ordinarily deemed a condition precedent to the liability of the surety or guarantor;²² and so of any other act, whether for the benefit of the principal or the surety,²³ as that the creditor should assign to the surety a mortgage held from the principal,²⁴ or cancel such a mortgage, so that the surety could

19. *Killian v. Ashley*, 24 Ark. 511, 91 Am. R. 519; *Davis, Belan Co. v. Nat. Surety Co.*, 139 Cal. 223; *Coffin v. Trustees*, 92 Ind. 337; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. R. 111; *Harwood v. Johnson*, 20 Ill. 367.

20. *Crofts v. Beale*, 11 C. B. 172; *Shupe v. Galbraith*, 32 Pa. St. 10; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85, 88; *Strong v. Sheffield*, 144 N. Y. 392.

21. *Sawyer v. Chambers*, 43 Barb. (N. Y.) 622; *Gunnis v. Weigley*, 114 Pa. 191; *Dunbar v. Fleisher*, 137 Pa. St. 85. See *Joyce v. Auten*, 179 U. S. 591. See however, Post, sec. 194, as to set-off and counterclaim.

22. *Rolt v. Cosens*, 18 C. B. 673, 86 E. C. L. 673; *Smith v. Compton*, 6 Cal. 24; *Jones v. Keer*, 30 Ga. 93.

23. *Fay v. Jenks*, 93 Mich. 130.

24. *Capps v. Smith*, 4 Ill. 177.

have security on the same property.²⁵ So, where the guaranty was in consideration of the discontinuance of an action against the principal and the creditor entered up judgment in spite of it, the surety was held not liable,²⁶ and the same result has been reached where a part of the consideration for a guaranty was that the principal would be given an exclusive selling agency for certain territory. This decision, however, was grounded upon the breach of an essential term or condition of the contract rather than upon a technical failure of consideration.²⁷ More as to conditions precedent and subsequent will appear under appropriate heads further on.

25. *Jeffries v. Lamb*, 73 Ind. 202; *Campbell v. Gates*, 17 Ind. 126.

26. *Bookstaver v. Jayne*, 60 N. Y. 146.

27. *Fay v. Jenks*, 93 Mich. 130. See also, *Crigler v. Bedell*, 51 Hun (N. Y.) 638.

CHAPTER III.

INCAPACITY OF PARTIES AS AFFECTING THE CONTRACT OF GUARANTY OR SURETYSHIP.

§ 20. **Incapacity of Principal.** The general proposition that the liability of a guarantor or surety is limited by that of his principal¹ is subject to several exceptions, chief among which is the exception that where the non-liability of the principal is founded upon reasons personal to himself in the nature of a personal privilege or protection, rather than upon any defect inherent in the principal contract itself, the surety will be bound. Hence, that the principal is under a personal incapacity to contract does not ordinarily prevent his guarantor or surety from becoming bound. In fact the incompetency of the principal may be the very reason for requiring the undertaking of a guarantor or surety.² Thus, the surety or guarantor of an infant is bound, and remains so though the infant exercises his right of repudiation,³ unless, it seems, the infant principal returns, or is in position to return, the whole of the consideration covered by the guaranty,⁴ or has exercised his right of rescission before the consideration has been enjoyed by him.⁵

So where the principal is a married woman her surety is bound though her contract is absolutely void on account of her coverture.⁶

1. Post, sec. 89.

2. *Yale v. Wheelock*, 109 Mass. 502; *Kyger v. Sipe*, 89 Va. 507; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Kimball v. Newell*, 7 Hill (N. Y.) 116; *Robbins v. Robinson*, 176 Pa. 341.

3. *Goodell v. Bates*, 14 R. I. 65; *Winn v. Sanford*, 145 Mass. 302, 1 Am. St. R. 461, 1 L. R. A. 52; *Dexter v. Blanchard*, 11 Allen (Mass.) 365; *Kyger v. Sipe*, supra. As to whether the guarantor's contract must be in writing under the statute of frauds where the principal is an infant, see Post, sec. 66. *Maggs v. Ames*, 4 Bing. 470.

4. *Baker v. Kennett*, 54 Mo. 82; *Patterson v. Cave*, 61 Mo. 439.

5. See *International Text Book Co. v. McKone*, 133 Wis. 200.

6. *Kimball v. Newell*, 7 Hill (N. Y.) 116; *Singley v. Head*, 2 Rich Eq. (S. Car.) 590, 45 Am. D. 750; *Winn v. Sanford*, 145 Mass.

It seems to make no difference that the surety signed without knowledge of the principal's incapacity, unless the creditor was guilty of some misrepresentation or concealment regarding it, the presumption being that the surety had acquainted himself with the facts in this respect.⁷

The foregoing rules apply where the principal is a lunatic, and it was held error where the principal upon a note was joined in suit with competent sureties to instruct the jury that if the principal was of unsound mind to such an extent when he signed the note that he was unable to comprehend the nature, meaning and effect of his act, they should return a verdict for the defendants.⁸

§ 21. Incapacity of Surety or Guarantor—Coverture. At common law, owing to her general disability to contract, a married woman could not bind herself either as principal or as guarantor or surety. Her promise in either capacity was absolutely void.⁹ In equity, however, a married woman's contract of suretyship might, under the law as it has prevailed in England and a number of our States, be binding upon her equitable separate property where she intended to charge it therewith.¹⁰ Whether she may bind herself or her property as guaran-

39, 1 Am. St. R. 461, 1 L. R. A. 512; *Yale v. Wheelock*, 109 Mass. 502; *Foxworth v. Bullock*, 44 Miss. 457; *Nabb v. Koontz*, 17 Md. 283; *Weare v. Sawyer*, 44 N. H. 198, 205; *Weed Co. v. Maxwell*, 63 Mo. 486; *Wiggins' Appeal*, 100 Pa. 155; *Davis v. Statts*, 43 Ind. 103, 13 Am. R. 382. The surety is bound though he signs jointly or jointly and severally with a married woman as principal. *Allen v. Berryhill*, 27 Ia. 534, 1 Am. R. 309; *Winn v. Sanford*, *supra*. As to whether the undertaking of a surety or guarantor for a married woman is original or collateral under the statute of frauds, see *Post*, sec. 66.

7. *Kimball v. Newell*, *supra*; *Lee v. Yandell*, 69 Tex. 34.

8. *Lee v. Yandell*, *supra*.

9. *Spencer Dom. Rel.*, secs. 179, 182; *Crawford v. Hazelrigg*, 117 Ind. 63, 2 L. R. A. 139; *Freeman's App.*, 68 Conn. 533, 57 Am. St. R. 112.

10 See *Heatley v. Thomas*, 15 Vesey 596; *Owens v. Dickinson*, 1 Cr. & Ph. 48; *Bradford v. Greenway*, 17 Ala. 797, 52 Am. D. 203, and authorities cited upon the proposition of the text and as to the intent to charge separate estate; *Bell & Terry v. Kellar*, 13 B. Monr. (Ky.) 381.

tor or surety under modern statutes must depend upon the scope and character of the statutes themselves. In states where she is given the rights and powers of a feme sole as to property and contracts she can bind herself as surety or guarantor the same as a feme sole, unless expressly forbidden so to do. In most states, however, a married woman cannot bind herself personally by contracts unless they are made for the acquisition, use or enjoyment of her separate property, and can only bind her separate estate by her general engagements where her intention to do so appears.¹¹ Contracts of guaranty and suretyship entered into by a married woman under these acts without benefit to her separate estate are therefore void as a rule, unless they are made a specific charge on such separate estate by way of lien or mortgage, or unless her intention to charge it generally with them in some way appears. Some courts have held that her intention to charge her separate estate by such a contract must appear from the very contract or instrument that is the foundation of the charge,¹² and the decisions in most other states seem to require strict proof of the wife's intention to charge her separate estate by contracts not entered into for its benefit,¹³ unless they are entered into for her own personal benefit or advantage, at least.¹⁴

If, however, the contract of guaranty or suretyship is one that directly concerns the acquisition, enjoyment

11. Spencer Dom. Rel. Sec. 248; *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. R. 141. See *Habenicht v. Rawls*, 24 S. Car. 461.

12. *Yale v. Dederer*, 22 N. Y. 450; 78 Am. D. 216; *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. R. 141; *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250; *Willard v. Eastham*, 15 Gray (Mass.) 328, 77 Am. D. 366; *Athol Machine Co. v. Fuller*, 107 Mass. 437. See *Williams v. Hugunin*, 69 Ill. 214, 18 Am. R. 607; *Dismukes v. Shafer*, (Tenn. Chancery), 54 S. W. 671; *National Exchange Bank v. Cumberland Co.*, 100 Tenn. 479. In *Gosman v. Cruger*, *supra*, it was held insufficient to charge the estate of a feme covert on a guardian's bond that it was given pursuant to an order of court, and that it was accompanied by her affidavit that she had the requisite amount of property.

13. *Farmers Bank v. Boyd*, 67 Neb. 497; *Benson v. Zimmers*, 21 Ky. L. 1060.

14. *Gosman v. Cruger*, 69 N. Y. 87; 25 Am. R. 141.

or management of her separate estate, she will probably in most states be liable thereon.¹⁵

In several states a wife is expressly prohibited from binding herself as surety, or as surety for her husband or by any assumption of his debts.¹⁶ Under such provisions there must be a liability substantially the husband's,¹⁷ and a contract by the wife, though it be for the benefit of the husband, will bind her if otherwise valid, provided there was no debt or obligation on his part but only on hers, as where he, being ill and without means, she hired physicians on her own responsibility to attend him;¹⁸ and so where she borrowed money from a lender ignorant of her purpose, intending to pay it over to her husband or to apply it on his debt.¹⁹

A mortgage of the wife's property to secure the husband's debt, has been held void under statutes prohibit-

15. Thus a married woman was held on her guarantee of a note payable to her order, upon a sale thereof, and it was not incumbent on the purchaser to inquire how she intended to dispose of the proceeds. *Kitchen v. Chapin*, 64 Neb. 144, 97 Am. St. R. 637, distinguishing *Russell v. Bank*, 39 Mich. 671, 33 Am. R. 444, where it was held that a married woman was not bound by her indorsement of the note of a corporation in which she was a shareholder, though her object was to protect it against suit. See also *Taylor v. Am. Freehold Co.*, 106 Ga. 238; *Kriz v. Peege*, 119 Wis. 105.

16. See cases throughout this section, and *Warrey v. Foest*, 102 Ind. 205; *Field v. Campbell*, 164 Ind. 389, 108 Am. St. R. 301; *Continental National Bank v. Clarke*, 117 Ala. 292; *Lewis v. Howell*, 98 Ga. 428; *Tompkins v. Trippett*, 110 Ky. 824, 96 Am. St. R. 472. Compare *Taylor v. Am. Freehold etc. Co.*, 106 Ga. 238. That the wife was a mere surety may be shown by parol even as against a bona fide holder of her note. See *Vorres v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45. Compare *Strickland v. Vance*, 99 Ga. 531, 59 Am. St. R. 241; *Tompkins v. Trippett*, *supra*.

17. *Veal v. Hurt*, 63 Ga. 378.

18. *Parsons v. McLane*, 64 N. H. 478.

19. *Wells v. Foster*, 64 N. H. 585. In *Iona Sav. Bank v. Boynton*, 69 N. H. 77, knowledge of the wife's purpose to turn the money over to the husband was deemed immaterial where she signed the note alone and no credit was extended to him. See *McGee v. Cunningham*, 69 S. Car. 470. Compare *Patrick v. Smith*, 165 Pa. 526.

ing her from becoming directly or indirectly surety for him.²⁰

§ 22. Same—Infancy. That the surety is generally incompetent to contract is always a defense to an action against him by the creditor, unless the surety has in some way estopped himself to plead his incapacity.

By many of the older authorities and some modern ones, such contracts of an infant as the court could pronounce to be plainly or necessarily to his prejudice are absolutely void, and the law of a few states so remains. In most jurisdictions, however, none of an infant's contracts are absolutely void, but are voidable merely at his option,²¹ and his contracts of guaranty and suretyship are hence capable of ratification and will become binding upon him if affirmed by him after full age.²² Indeed in some of those jurisdictions where the contracts of an infant plainly or necessarily to his prejudice are pronounced void, his contract of suretyship is not deemed to be so obviously of that nature that it can be said to be void as a matter of law, and hence is classed as voidable only.²³

§ 23. Same—Persons Forbidden to Become Sureties by Statutes: In some states certain persons are expressly forbidden by statutes to become or be received as sureties, at least on some kinds of undertakings. Thus attor-

20. *Bond v. Sullivan*, 133 Ga. 160; *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. R. 117; *Evans v. Faircloth*, *Byrd Co.*, 165 Ala. 176. See also, *Spencer v. Leland*, 69 So. Rep. 400 (Ala. 1912), and Ala. Code 1907, sec. 4497; *Kenney v. Henring*, 44 Ind. App. 590. Compare *Kuhn v. Ogilvie*, 178 Pa. St. 303. The rule as to the suretyship position of the wife where no such statutes exist is stated, *Ante*, sec. 9. Where the wife borrowed money voluntarily on a mortgage of her estate it was held valid though the lender knew she intended to use the money in payment of her husband's debts. *Johnson v. A. Leffler Co.*, 122 Ga. 670.

21. *Spencer Dom. Rel.* sec. 541.

22. *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. R. 496, and cases cited.

23. *Owen v. Long*, 112 Mass. 403.

S. S. 3

neys at law are sometimes prohibited from becoming sureties upon bonds given in the course of legal proceedings. Such statutes however, are generally held to be directory merely, and not to create a positive disability, and the prohibited party, if received as surety, is nevertheless bound.²⁴

§ 24. Same—Lunacy of Surety or Guarantor. A lunatic's contract of suretyship like his other engagements is voidable at most, unless at the time of signing he had been judicially found incompetent to manage his own affairs and a guardian or conservator was in charge of his estate, in which case by the weight of authority his contracts save for necessities are absolutely void. But a lunatic not under guardianship may be bound as a surety if his derangement did not affect his ability to comprehend the nature and probable consequences of his undertaking, or it was entered into in a lucid interval; and even where his infirmity precludes such comprehension, he will be bound by his contract, according to many authorities, where the transaction was fairly entered into and the sane party was ignorant of the insanity, and such contract has been so far performed that the latter cannot be restored to his original position.²⁵ This rule has been repudiated, however, in several states,²⁶ and how far it would be applied in others to a lunatic's contract of suretyship founded upon no substantial benefit to himself would seem uncertain, unless the lunatic is under guar-

24. *Sherman v. State*, 4 Kan. 570; *Jack v. People*, 19 Ill. 57. Similarly where a County Judge was prohibited, the acceptance of a bond by a County Court with a Judge as surety thereon, binds the surety. *State v. Findley*, 101 Mo. 368. So where a statute forbids the acceptance of non-residents as bail they are nevertheless bound. *Com. v. Ramsey*, 2 Duv. (Ky.) 386. Compare *Cothern v. Connaughton*, 24 Wis. 134.

25. See *Spencer Dom. Rel.*, secs. 636, 642, 644.

26. *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Brigham v. Fairweather*, 144 Mass. 52 and cases cited; *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. R. 468; *Hovey v. Hobson*, 53 Me. 451, 89 Am. D. 705; *Fitzgerald v. Reed*, 9 S. & M. (Miss.) 94; *Orr v. Mortgage Co.*, 107 Ga. 499.

dianship.²⁷ In the latter case his contracts, save for necessities at reasonable prices are quite generally held absolutely void.

§ 25. Ultra Vires Contract of Corporate Principal. A surety upon the contract of corporation will be found in spite of the fact that such contract is ultra vires, provided it is not otherwise illegal or forbidden by law or public policy. The sureties are estopped.²⁸

§ 26. Private Corporations as Guarantors or Sureties. A corporation, being the creature of the laws, has, in general, only such powers as are reasonably necessary or appropriate to the accomplishment of the purposes for which it was expressly formed.²⁹ Usually, therefore, the guaranty or suretyship undertakings of ordinary corporations are void, not because they are under any inherent and uniform incapacity to contract as guarantors or sureties, but because such undertakings are, under most circumstances, foreign to the objects of their creation and not necessary, appropriate or convenient means of transacting the business or accomplishing the purposes of their organization, and hence ultra vires unless specially authorized by their charters or articles

27. That his suretyship under such circumstances is void, see *Edwards v. Davenport* (C. C.) 20 Fed. 756; *Van Patten v. Beals*, 46 Ia. 62.

28. *Yorkshire Ry. Wagon Co. v. Maclure*, L. R. 19 Ch. D. 478; *Gist v. Drakely*, 2 Gill (Md.) 330, 41 Am. D. 426; *Davis v. Commissioners*, 72 N. Car. 441; *State v. Fortinberry*, 54 Miss. 316; *Weare v. Sawyer*, 44 N. H. 198; *Bowman Cycle Co. v. Dyer*, 31 Misc. (N. Y.) 496, 64 N. Y. Suppl. 551; *Remsen v. Graves*, 41 N. Y. 471; *Mason v. Nichols*, 22 Wis. 376; *Madison v. Am. etc. Co.* 118 Wis. 480, 512; *Hubbard v. Haley*, 96 Wis. 578; *Zerkle v. Price*, 7 Ohio S. & C. Pl. Dec. 465, 5 Ohio N. P. 480; *Mitchell v. Hydraulic, etc. Co.* —Tex. Civ. App. —, 129 S. W. 148. See *Koehler v. Reinheimer*, 20 Misc. (N. Y.) 62, 45 N. Y. Suppl. 337; *Edwards Co. v. Jennings* (Tex. Civ. App. 1895), 33 S. W. 585. See also *Robbins v. Robinson*, 176 Pa. 341. See Post, sec. 49.

29. *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543, 579, 99 Am. D. 300. *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 560.

of organization.³⁰ Upon this ground contracts of guaranty and suretyship entered into by corporations for the mere accommodation of others are ultra vires and void, at least in the hands of parties having notice of the nature of the transaction.³¹ But where a contract of suretyship or guarantee is a necessary, appropriate or usual means of transacting its business, the corporation will be bound thereby unless it is expressly restrained from making it by its charter or articles of organization or by general law. Thus a corporation in disposing of its commercial paper may indorse it and will be liable as a guarantor or surety of the law merchant. So, it will doubtless be bound by any guaranty that is a mere incident or inducement to the purchase of non-negotiable choses in action lawfully owned and assigned by it.

But though the corporation may derive some mere remote, contingent or possible benefit therefrom, it will not, for that reason alone, be bound by its undertaking of guaranty or suretyship, or an undertaking of that nature. Thus, where a railroad corporation guaranteed the expenses of a musical festival, it was held not liable, though the guarantee was given to secure the festival to be held, and the holding of it would naturally result in increased traffic to the corporation.³² So a corpora-

30. Green's Brice's Ultra Vires, 252; 4 Thomp. Corp. sec. 5721; Smith v. Ala. Life Ins. Co., 4 Ala. 558; Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. R. 449; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. R. 26, 50 L. R. A. 765; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. R. 595; Davis v. Railroad Co. 131 Mass. 258, 41 Am. Rep. 221, reviewing English and federal decisions.

31. In addition to the authorities cited above see 1 Brandt on Sur. (3rd Ed.) sec. 12; Lucas v. White Line Transfer Co. 70 Ia. 541, 59 Am. R. 449. Commercial paper of a private corporation having power to issue commercial paper for any purpose is good in the hands of a holder for value without notice of its character though originally issued for accommodation. Miners Ditch Co. v. Zellerbach, 37 Cal. 579, 99 Am. D. 300; Monumental Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. R. 322.

32. Davis v. Railroad Co., 131 Mass. 258, 41 Am. R. 221. See also Weikle v. Minneapolis, etc. Ry. Co., 64 Minn. 296. Compare State Board of Agriculture v. Citizens St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702.

tion chartered for the manufacture and sale of beer was held to have no implied power to bind itself as surety on an appeal bond in an action of unlawful detainer, brought against a customer for possession of leased premises on which its beer was sold.³³

But it was held not *ultra vires* of a brewing company to guarantee the rent of a hotel, where it owned the bar furniture and fixtures and its beer was sold therein.³⁴ Indeed the defense of *ultra vires* is not a favored one, and though a contract may not be a necessary or usual means of furthering the ends for which the corporation was formed, if convenient and germane to the general purpose of the corporation, the tendency of modern decisions is to uphold it in the face of the defense of *ultra vires*. So, a corporation authorized to do a wholesale lumber business and all business incidental thereto was held bound by a guarantee of performance of a building contract by one to whom it was furnishing materials for a building, and may agree to save the owner harmless from mechanics' liens thereon.³⁵

§ 27. Same—Incorporated Surety Companies. Private contracts of suretyship, as is well known, have been largely superseded of late years by the bonds of so called fidelity and guaranty companies, or surety companies as they are briefly termed. These "bonds," so called, may be against loss or damage arising from the dishonesty, fraud or unfaithful performance or breach of duty of officers

33. *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. R. 26, 50 L. R. A. 765. Compare *Midland Tel. Co. v. National Tel. Co.*, 236 Ill. 476.

34. *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, *Field v. Buir Br'g Co.*, 18 N. Y. Supp. 456. Compare *Filon v. Miller Brewing Co.*, 38 N. Y. St. 602, 15 N. Y. Supp. 57. But the mere hope or expectation that the tenant would become a customer would doubtless be insufficient to validate the guaranty. *Koehler v. Rheinheimer*, 20 Misc. 62, 45 N. Y. Supp. 337.

35. *Interior Woodwork Co. v. Prasser*, 108 Wis. 557. See also *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 170; *Martin v. Niagara Falls Paper Co.*, 122 N. Y. 165, involving consent or ratification by stockholders.

or agents, public or private, or against breach of contract for particular work or the non-payment of debts, or they may be given in the regular course of judicial proceedings. In any event the power of the corporation to issue the bond must be found in its charter or instrument of organization. When chartered to issue bonds or contracts of this kind as a business, however, they are essentially insurance companies and their business, by the overwhelming weight of authority, is that of insurance, not only in the sense that their contracts to indemnify are commonly construed substantially as policies of insurance,³⁶ but in the sense that they are subject to the general statutory regulations applicable to domestic and foreign insurance companies,³⁷ unless these are superseded by provisions specially applicable to such companies. A foreign surety company, however, will not be permitted to escape liability on its bond by reason of its failure to comply with provision of statute under which such corporations are authorized to do business in the state, unless the statute declares the policies of such unauthorized company void.³⁸

§ 28. Surety to Corporation in Ultra Vires Transaction. Though the contract of a corporate obligee is ultra vires and would hence be unenforceable against it, a surety for its faithful performance will be held to the extent at

36. Post secs., 93 et seq.

37. See *People ex rel. v. Rose*, 174 Ill. 310, 44 L. R. A. 124; *People ex rel. v. F. & C. Co. of N. Y.*, 153 Ill. 25, 26 L. R. A. 295; *People ex rel. Nat. Sur. Co. v. Feitner*, 166 N. Y. 129; *U. S. Fid. & Guar. Co. v. Linehan*, 47 Atl. 611. In *re Clarks Estate*, 195 Pa. St. 520, 48 L. R. A. 587; *Bank of Tarboro v. Fid. & Dep. Co.*, 128 N. Car. 366. 83 Am. St. R. 682.

38. *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85; *Phenix Ins. Co. v. Penn. R. Co.*, 134 Ind. 215, 20 L. R. A. 405. See *Richards on Ins.* (3rd Ed.), sec. 7, and cases cited, as to this subject and as to the right of the unauthorized company to recover premiums. The business of insurance is not commerce within the meaning of the federal constitution, and hence foreign surety companies are subject to state regulation and control. Their business, however, is private in its nature and the state has no power to prescribe rates of premiums to be charged by them. *Am. Surety Co. v. Shallenberger*, 183 Fed. 636.

least of the benefits actually received under it by his principal.³⁹

§ 29. Partners and Co-Partnerships as Sureties. There is nothing inherent in the partnership relation that prevents partners from binding themselves separately and as individuals as guarantors or sureties for their co-partners or for others, nor to prevent a firm as such from becoming liable as guarantors or sureties, provided all its members consent or ratify the contract when made in the firm name either by one of its members or by a non partner, though in some jurisdictions, if the suretyship undertaking be under seal, authority to execute it must be under seal in order to bind the firm.⁴⁰

In the absence of any restriction upon the powers of its individual members, known to those who deal with them every partner is its general agent to carry on its business in the ordinary way, but not for other purposes unless an actual authority or a ratification be proved.⁴¹ Bearing this principle in mind, whether a firm is bound by the act of one partner not specially authorized in signing its name to a contract of guaranty or suretyship must depend, in general, upon whether such contract is actually or apparently necessary or appropriate to the prosecution in the ordinary way of the business in which it is engaged; and it is only because such contracts are rarely so necessary or appropriate that an ordinary partnership is seldom bound by his act in so signing unless

39. *City of Unionville v. Martin*, 95 Mo. App. 28; *City of St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. R. 764, and authorities cited; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664.

40. *Gordon v. Funkhouser*, 100 Va. 675; *Cummins v. Cassily*, 5 B. Monr. (Ky.) 74; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665. If the instrument of guaranty would be valid without a seal many authorities reject the seal as surplusage and hold the firm as upon a simple contract. At any rate the partner executing such an instrument should be bound. See the dissenting opinion of Wells, J. in *Russell v. Annable*, *supra*.

41. See 1 Bates on Part., secs. 349, et seq; *Pooley v. Whitmore*, 10 Helsk. (Tenn.), 629, 27 Am. R. 733 where the general rule is well stated.

it was specially authorized or subsequently ratified by all the partners.⁴² A partner who signs the firm name without authority, however, is bound to the same extent as if he had signed in his own name.⁴³ Furthermore, the real and not the apparent nature of the transaction determines the question of liability, and if the firm was actually the principal, though it appears as guarantor or surety, it is bound by the act of the signing partner if it was otherwise within the scope of his powers.⁴⁴ The firm is, of course, bound by a guarantee or indorsement given by one partner before dissolution in the sale and transfer in course of business of commercial paper or other choses in action belonging to it. After dissolution, however, this power appears not to exist, and even an ordinary indorsement after dissolution would not bind the firm, it seems, unless specially authorized, or unless made "without recourse."

§ 30. Contracts of Guaranty and Suretyship Through the Intervention of Agents. Either party to a contract of guaranty or suretyship may act through an agent, and the general principles of the law of agency apply in such cases. Generally, however, the authority of an agent to bind his principal as surety must be strictly pursued,⁴⁵ and this is particularly true where the agent acts under

42. See *Clarke v. Wallace*, 1 N. Dak. 404, 26 Am. St. R. 636; *Andrews v. Planters' Bank*, 7 S. & M. (Miss.) 192, 45 Am. D. 300; *New York, etc., Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. D. 109, and note; *Avery v. Rowell*, 59 Wis. 82. These principles of the text are well illustrated by the case of accommodation paper. If a partner in a trading firm signs the partnership name to such a paper without authority a holder in due course who takes it without notice of its accommodation character may recover against the firm, while one who takes it with notice of such character may not. *Reed v. Bacon*, 175 Mass. 407; *Catskill Bank v. Stall*, 15 Wend. (N. Y.) 364, 18 Id. 466; and see *Pooley v. Whitmore*, supra.

43. *Ramsbottom v. Lewis*, 1 Camp. 279; *Avery v. Rowell*, 59 Wis. 82; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. R. 562.

44. *Winship v. Bank*, 5 Pet. (U. S.) 529; *Langan v. Hewitt*, 13 S. & M. (Miss.) 122; *Bank v. Muddgett*, 44 N. Y. 514; *Gano v. Samuel*, 14 Oh. 592.

45. *Braun v. Hess & Co.*, 187 Ill. 283.

power of attorney or other formal authority.⁴⁶ Neither is authority to bind the principal as surety inherent in a general agency save in the case of surety companies.⁴⁷

So far as the bonds or policies of surety companies are concerned, however, the principles of agency applicable to insurance generally will govern. Thus its general agent in a particular locality may there make any contract that the company might make, even though he violates his special instructions, provided these are unknown to the beneficiary or obligee. The latter is not chargeable with notice of them by reason of a term in the contract or otherwise,⁴⁸ and the company will be estopped to assert that one whom it has held out as its general agent is not such in fact as against one who, acting prudently, has been misled.⁴⁹ The authority of the agents of the beneficiary with respect to representations or concealment affecting surety bonds is discussed in another place.⁵⁰

46. *Dugan v. Champion Coal etc. Co.*, 105 Ky. 821, 20 Ky. L. 1641.

47. *Hamburg Bank v. Johnson*, 3 Rich. (S. Car.) 42; *Braun v. Hess*, 187 Ill. 283; *Stevenson v. Hoy*, 43 Pa. St. 191; *Bullard v. De-Groffe*, 59 Neb. 783. See on the question of authority of agent to fill blanks in a sealed instrument of suretyship. *Post*, secs. 44, 47. On the implied agency of the principal to deliver an instrument of suretyship, see *Post*, sec. 44.

48. *Anderson v. Nat. Surety Co.*, 196 Pa. St. 288.

49. *Bowers v. Bryan Lumber Co.*, 152 N. Car. 604; *Anderson v. Nat. Surety Co.*, *supra*.

50. *Post*, sec. 53.

CHAPTER IV.

OFFER OF GUARANTY, ITS ACCEPTANCE AND THE NOTICE THEREOF.

§ 31. **In General.** The law of the subject of acceptance of guarantees or offers of guaranty and notice thereof in the several jurisdictions is involved in considerable doubt and difficulty, and the current of decision in this country is, at some points, far from uniform. Perhaps the most convenient way to examine the subject will be to determine in what classes of cases a distinct or formal notice of acceptance of guaranty is unnecessary by all, or practically all, of the authorities, and then to consider those circumstances under which the rulings in the several jurisdictions conflict, and the variant rulings involved.

An offer of guarantee, like any other offer of a contract, requires acceptance by the creditor to render it binding on the guarantor. Keeping this principle in mind, no distinct or formal acceptance or notice of acceptance is required.

(1) Where the guarantee is signed at the request of the creditor, or in his presence and with his knowledge.¹

(2) Where it is signed upon a distinct and valuable consideration, however small, moving from the creditor to the guarantor, or the receipt of such consideration is acknowledged by the guarantor.²

(3) Where the guarantee is of a definite subsisting obligation of the principal to the creditor, or a contract entered into contemporaneously with the guaranty and as part of the same transaction.³

(4) Where the guarantee is by specialty, or is in

1. Post next section.

2. Post sec. 33.

3. Post, sec. 34.

the form of a promise by the guarantor or surety jointly with the principal.⁴

It should be observed that whether notice of the acceptance of the guarantee is or is not required to render the guarantor liable, he may nevertheless be released by lack of demand upon the principal or notice of his default at or after the maturity of the debt or obligation guaranteed. This phase of the law of notice with respect to guarantees is in the main distinct from the present one, and is for consideration later on.⁵

§ 32. Guarantor Signing at Request of Creditor. Where the guarantee is signed at the request of the creditor, the cases are practically unanimous that no other or further notice of its acceptance by him is required, and that, though the guarantee be of debts to be contracted or advances to be made in the future, the guarantor who so signs becomes bound for them the moment they are made, without further notice, unless he has specially stipulated therefor;⁶ and so where the guaranty is signed in the presence of the creditor and with his knowledge.⁷

§ 33. Distinct and Valuable Consideration Moving From Creditor to Guarantor Where the contract recites the receipt by the guarantor of a distinct and valuable consideration, however small, moving to him from the creditor, whether it is paid or not,⁸ or there is proof of

4. Post, sec. 35.

5. See Post, secs. 41, 184, 185.

6. *Davis v. Richards*, 115 U. S. 524; *Davis v. Wells*, 104 U. S. 159; *Cooke v. Orne*, 37 Ill. 189; *Frost v. Standard Metal Co.*, 215 Ill. 241; *Deere Plow Co. v. McCollough*, 94 Mo. App. 518; *Stewart v. Sharp Co. Bank*, 71 Ark. 585. Where the creditor wrote the principal "If Cooke will guaranty, I will sell," etc. and Cooke wrote a guaranty at the foot of the letter, the contract was complete without further notice of acceptance by the creditor. *Cooke v. Orne*, supra. See *Somersall v. Barneby*, Cro. Jac. 287.

7. As to the necessity for notice of default, or balance due under guarantees, see Post, secs. 184, 185. *Wildes v. Savage*, 1 Story (U. S.) 22.

8. *Davis Machine Co. v. Richards*, 115 U. S. 524; *Davis v. Wells*, *Fargo & Co.*, 104 U. S. 159; *Lawrence v. McCalmont*, 2 How. (U. S.)

payment of a distinct and valuable consideration by the creditor to the guarantor,⁹ this constitutes an acceptance by the creditor or guarantee, and no further notice of acceptance, by him is required, unless specially stipulated for by the guarantor.

§ 34. Guarantee of Subsisting or Contemporaneous Obligation. A guarantee of a subsisting obligation of the principal to the creditor cannot be binding without a new and distinct consideration moving from the creditor.¹⁰ If it moves from the creditor to the guarantor, this brings the case plainly within the rule of the preceding section and no further notice of acceptance is required.¹¹

If the guarantee is made when the original contract with the principal is made, and as part of the same transaction, no notice of acceptance is required.¹²

§ 35. Guarantee by Specialty—Joint Promise. It appears to be conceded that where the guaranty is under seal, it becomes binding, at least in the absence of statutes changing the common law effect of a seal, without special or formal notice that it has been accepted by be-

426; *Wildes v. Savage*, 1 Story 22; *Emerson Mfg. Co. v. Rustad*, 19 N. Dak. 8, and cases cited; *Buhrer v. Baldwin*, 137 Mich. 263; *Sears v. Swift & Co.*, 66 Ill. App. 496; *Howe v. Nickels*, 22 Mo. 175. Compare *Barnes Cycle Co. v. Reed*, 84 Fed. 616, 91 Id. 481, 33 C. C. A. 646, 63 U. S. App. 279.

9. *Davis v. Wells*, supra; *Koenigsberg v. Lenning*, 161 Pa. 171.

10. See Ante, sec. 16.

11. *Wildes v. Savage*, 1 Story (U. S.) 22; *Bleeker v. Hyde*, 3 McLean, (U. S.) 279; *Kent v. Silver*, 108 Fed. 365, 47 C. C. A. 404; *Steadman v. Guthrie*, 4 Met. (Mass.) 523; *White v. Reed*, 15 Conn. 463; *Central Savings Bank v. Shine*, 48 Mo. 456, 8 Am. R. 112; *Davis v. Jones*, 61 Mo. 409; *McKee v. Needles*, 123 Ia. 593; *Thompson v. Glover*, 78 Ky. 193, 39 Am. R. 220. See *Wills v. Ross*, 77 Ind. 1, 40 Am. R. 279.

12. *Bechtold v. Lyon*, 130 Ind. 194; *Closson v. Billman*, 161 Ind. 610, 616; *Wright v. Griffith*, 121 Ind. 478, 6 L. R. A. 639; *Walker v. Forbes*, 25 Ala. 139, 60 Am. D. 498; *Bushnell v. Church*, 15 Conn. 406. See also, *Roberts v. Woven Wire Mattress Co.*, 46 Md. 374. Compare *Deering v. Mortell*, —S. Dak. —, 16 L. R. A. (N. S.) 352.

ing acted upon or otherwise. Whether this is upon the theory that the guarantor has made an offer that he cannot withdraw, or upon the theory that the seal imports a consideration, is not altogether clear.¹³

It seems, furthermore, that even where the promise for future advances is in the form of a joint obligation or technical suretyship, or guaranty in the nature of a suretyship to become operative when credit is given, it binds both principal and surety, without notice to the latter, as soon as advances are made upon it.¹⁴

§ 36. Offer of Guaranty—Future Advances—Problem Stated. Where the guarantee falls under none of the heads above discussed, being signed but not sealed by the guarantor without any previous request of the creditor, and in his absence, and upon no consideration save that of future advances that may or may not be made by the creditor to the principal, or future trust that may or may not be imposed in him, is it to be treated (1) simply as an offer of a promise for an act, so that the guarantor becomes bound the moment such advances are made to the principal or the trust is imposed in him upon the faith of it;¹⁵ or is it to be regarded (2) as an offer of a promise which is to bind the guarantor, not merely upon condition of credit being given or trust imposed upon the faith of it, but upon the further condition of his receiving notice, or acquiring knowledge within a reason-

13. See *Davis v. Wells Fargo Co.*, 104 U. S. 159; *Powers v. Bumcratz*, 12 Oh. St. 273.

14. *Maynard v. Morse*, 36 Vt. 617; *Hall v. Weaver*, 34 Fed. 104; *Bank v. Kercheval*, 2 Mich. 504; *Cox v. Machine Co.*, 57 Miss. 350; *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. R. 323; *Saint v. Wheeler*, 95 Ala. 302, 36 Am. St. R. 210; *Rochefford v. Rothschild*, 16 Oh. C. Ct. 287. And so if the promise of the alleged guarantor is construed as direct and original rather than collateral. *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 586. See *Singer Mfg. Co. v. Littler*, 56 Ia. 601. See also Post sec. 39.

15. *Davis v. Wells*, 104 U. S. 159; *Geer Machinery Co. v. Sears*, 119 Ky. 697.

able time, that the guaranty has been accepted by the creditor?¹⁶

§ 37. Same—The English Rule. The rule adopted in England and in some of our states, and which may be called for want of a better name, the English rule, treats a guaranty in the ordinary form of a letter of credit for future advances of goods or money, or to enable the principal to obtain some office or employment, as the offer of a promise for an act, and the guarantor becomes bound the moment the creditor makes the advances or gives the credit or receives the principal into the office or employment contemplated by its terms, unless the guarantor has stipulated for notice.¹⁷ This view of the law has been well expressed by Bronson, J. in *Smith v. Dann*,¹⁸ as follows:

“The defendant invited the plaintiff to sell goods to Steel & Wall, on his promise to guarantee the payment of the debt. The plaintiffs assented, and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law this made a complete contract. Nothing further was necessary to its consummation. If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done. There is nothing in the defendant’s undertaking which looks like a condition, or even a request, that the plaintiffs should give him notice if they acted upon the guaranty; and there is no

16. Post, sec. 38. See *Pearsall Mfg. Co. v. Jeffreys*, 183 Mo. 386, 105 Am. St. R. 496; *Cooke v. Orne*, 37 Ill. 186, 2 Pars. on Com. (9th Ed.), 12 and note. The problem is recognized in substantially the above form in *Sheffield v. Whitfield*, 6 Ga. App. 764. In other words does the offer contemplate a unilateral or a bilateral, contract?

17. *Somersall v. Barneby*, Cro. Jac. 287; *Kennaway v. Treleavan*, 5 M. & W. 498; *Oxley v. Young*, 2 H. Bl. 613; *Oldershaw v. King*, 2 H. & N. 517; *Laysaght v. Walker*, 5 Bligh. N. S. 1, 19, 22; *Powers v. Bumcratz*, 12 Oh. St. 284, and English cases cited and discussed. See *White v. Woodward*, 5 C. B. 810, 814.

18. 6 Hill (N. Y.) 544.

principle upon which we can hold that notice was an essential element of the contract."

The later decisions in New York and the cases in Ohio and Nebraska, and apparently in a few other states, are in accord with the doctrines above stated, where the guarantee contains no stipulation as to notice.¹⁹ To be distinguished from the cases already cited in this section however, are those in which the communication of the guarantor has been construed, not as a positive offer of guaranty, but as an expression of willingness to be bound as guarantor in case the creditor sees fit to apply to him to become such, or to accept him as guarantor.²⁰ Such a communication in all jurisdictions plainly

19. *Douglass v. Reynolds*, 24 Wend. (N. Y.) 25, 46; *Whitney v. Groot*, 24 Wend. (N. Y.) 82; *Union Bank v. Coster*, 3 N. Y. 203; 53 Am. D. 280; *City Bank v. Phelps*, 86 N. Y. 484 and cases cited; *Powers v. Bumcratz*, 12 Oh. 273, 284, overruling dictum in *Taylor v. Wetmore*, 10 Oh. 490; *Wise v. Miller*, 45 Oh. St. 388; *Wilcox v. Draper*, 12 Neb. 138, 41 Am. R. 763, discussing a large number of authoritative English and American cases; *Klosterman v. Olcott*, 25 Neb. 283; *Leninger & Metcalf Co. v. Wheat*, 49 Neb. 567; *Standard Oil Co. v. Hoese*, 57 Neb. 665; *Davis v. Mills*, 55 Ia. 543; *Platter v. Green*, 26 Kan. 252; *Boyd v. Snyder*, 49 Md. 365, with which compare *Heyman v. Dooley*, 77 Md. 162, 20 L. R. A. 257-n; *Crittenden v. Fisk*, 46 Mich. 70, 41 Am. R. 146; *Bright v. McKnight*, 1 Sneed (Tenn.) 158; *Yancey v. Brown*, 3 Sneed (Tenn.) 89; *Sheffield v. Whitfield*, 6 Ga. App. 762 and cases cited. *Manry v. Waxelbaum*, 108 Ga. 14 is distinguishable from the fact that a distinct consideration was recited in the guarantee. See *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. R. 845, including the dissent of Montgomery J.; *Wells v. Davis*, 2 Utah, 411, in both of which cases the guarantee referred both to existing indebtedness and future advances. In the last case, however, the receipt of a valuable consideration was acknowledged. See also *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686, where no notice was required because the promise of the defendant was deemed direct and absolute rather than collateral or in the nature of a suretyship rather than a guaranty.

20. See *McIver v. Richardson*, 1 M. & S. 557; *Gaunt v. Hill*, 1 Starkie, N. P. 10; *Symmons v. Want*, 2 Stark 371; *Mosley v. Tinkler*, 1 C. M. & R. 692; *Morten v. Marshall*, 2 H. & C. 305; *Wilcox v. Draper*, 12 Neb. 138, 41 Am. R. 763, and cases cited and reviewed. The English decisions above cited are sometimes referred to in support of the proposition that an offer to be responsible for future credits or advances requires notice of acceptance. See for example, *Craft v. Isham*, 13 Conn. at p. 39. See also *Somersall v. Barneby*, Cro. Jac. 287 (1611),

calls for the communication of an acceptance within a reasonable time;²¹ and even where the offer is one of guaranty rather than a mere expression of willingness to become bound as guarantor, notice of acceptance must be so communicated, if, upon a fair interpretation the offer contemplates its communication.²²

§ 38. The Federal or American Rule. In the federal courts and in those of a majority of our states, however, it is the established rule that where the guarantee is of a future credit and is not signed at the request of the creditor or in his presence and with his knowledge, or upon a valuable consideration moving from him to the guarantor or under seal, the latter is not bound from the fact merely that the creditor makes advances to the principal thereon, but from the further fact that the guarantor has notice within a reasonable time that the guaranty has been accepted, or, what is the same thing, that it has been acted upon,²³ and the rule is ordinarily

21. See *Wilcox v. Draper*, *supra*.

22. *Payne v. Ives*, 2 Dow. & Ry. 664. In this case an offer to indorse bills for a premium, was held to require the holders to apply for such indorsements within a reasonable time, and that a delay of seventeen months in so doing was unreasonable. The offer had lapsed.

23. *Edmonson v. Drake*, 5 Pet. (U. S.) 624; *Douglas v. Reynolds*, 7 Pet. 113, 12 Pet. 497; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Cremer v. Higginson*, 1 Mason (U. S.) 340; *Davis Co. v. Richards*, 115 U. S. 524; *Hart v. Minchen*, 69 Fed. 520; *Barnes Co. v. Reed*, 84 Fed. 603; *Walker v. Forbes*, 25 Ala. 139, 60 Am. D. 498; *Fay v. Hall*, 25 Ala. 709; *Cahusac v. Samine*, 29 Ala. 288; *McCullum v. Cushing*, 22 Ark. 540; *Geiger v. Clark*, 13 Cal. 579, with which compare, *London, etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. R. 64; *Henderson v. Reilly*, 1 McArth. (D. C.) 25; *Rapelye v. Bailey*, 3 Conn. 438, 8 Am. D. 199; *Craft v. Isham*, 13 Conn. 28; *Taylor v. McClung*, 2 Houst. 24; *Buckingham v. Murray*, 7 Houst. (Del.) 176; *Farmers' Bank v. Tatnall*, 7 Houst. (Del.) 287; *Claffin v. Briant*, 58 Ga. 414; *Cooke v. Orne*, 37 Ill. 186; *Newman v. Streator Co.*, 19 Ill. App. 594; *Tausig v. Reed*, 145 Ill. 488, 36 Am. St. R. 504; *Mayor v. Ruhstadt*, 66 Ill. App. 346; *Milroy v. Quinn*, 69 Ind. 406, 35 Am. R. 227; *Kline v. Raymond*, 70 Ind. 271; (see also *Jackson v. Yandes*, 7 Blackf. (Ind.) 526; *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686); *German Am. Bank v. Drake*, 112 Ia. 184, 51 L. R. A. 758, 84 Am. St. R. 335; *Kincheloe v. Holmes*, 7 B. Monr. (Ky.) 5, 45 Am. D. 41; *Bell v. Kellar*, 13 B. Monr. (Ky.) 381; *Lowe v. Beckwith*, 14 B. Monr. (Ky.) 184; 68

the same whether the offer is addressed to a particular person or generally, and whether it contemplates a single credit or a series of credits to the principal.²⁴

The reasoning upon which the federal decisions and those that substantially follow them proceed is not always quite the same. The rule requiring notice is treated by most of the authorities as one inherent in the very nature and definition of a contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it in order to constitute a binding promise, and this reasoning is commonly fortified by referring to the peculiar nature of the transaction and the importance of notice to the guarantor that his offer has been accepted, in order that he may take such steps

Am. Dec. 659; *Thompson v. Glover*, 78 Ky. 193, 39 Am. R. 220-n; *Illinois Bank v. Sloo*, 16 La. 539; *Menard v. Scudder*, 7 La. Ann. 386; *Lachman v. Block*, 47 La. Ann. 505; *Norton v. Eastman*, 4 Me. 521; *Tuckerman v. French*, 7 Me. 115; *Bradley v. Cary*, 8 Me. 234; *Howe v. Nickels*, 22 Me. 175; *Mussey v. Rayner*, 22 Pick. (Mass.) 223; *Allen v. Pike*, 3 Cush. (Mass.) 238; *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. R. 437; *Bascomb v. Smith*, 164 Mass. 61; *Brown v. Spiegel*, 156 Mich. 138; *Winnebago Mills v. Travis*, 56 Minn. 480; *Hill v. Calvin*, 4 How. (Miss.) 231; *Smith v. Anthony*, 5 Mo. 504; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. R. 508; *Central Bank v. Shine*, 48 Mo. 456, 8 Am. R. 112; *Taylor v. Shouse*, 71 Mo. 361; (compare *Davis Co. v. Jones*, 61 Mo. 409); *Pearsall Mfg. Co. v. Jeffreys*, 183 Mo. 386, 105 Am. St. R. 496 and cases cited; *Ellis v. Jones*, 70 Miss. 60; *McDougal v. Calef*, 34 N. H. 534; (Compare *Bank v. Sinclair*, 60 N. H. 100, 49 Am. R. 307); *Beebe v. Dudley*, 26 N. H. 249, 59 Am. D. 341; *Shewell v. Knox*, 1 Dev. (N. Car.) 404; *Taylor v. Wetmore*, 10 Oh. 490; *Patterson v. Reed*, 7 W. & S. 144; *Kay v. Allen*, 9 Barr, 320; *Kellogg v. Stockton*, 29 Pa. 460; *Gardner v. Lloyd*, 110 Pa. 278; *Coe v. Buehler*, 110 Pa. 366; *Evans v. McCormick*, 167 Pa. 247; *Bay v. Thompson*, 1 Pears. (Pa.) 551; *King v. Batterson*, 13 R. I. 117, 43 Am. R. 13; *Lawton v. Maner*, 9 Rich. 335; *Wardlaw v. Harrison*, 11 Rich. 626; *Duncan v. Heller*, 13 S. Car. 94; *Mayfield v. Wheeler*, 37 Tex. 256; *Wilkins v. Carter*, 84 Tex. 438; *Oaks v. Weller*, 13 Vt. 106, 37 Am. D. 583; 16 Vt. 63; *Lowry v. Adams*, 22 Vt. 166; *Woodstock Bank v. Downer*, 27 Vt. 539; *Noyes v. Nichols*, 28 Vt. 159; *Miami Co. Nat. Bank v. Goldberg*, 133 Wis. 175, 15 L. R. A. (N. S.) 1115n; *A. B. Kuhlman Co. v. Cave*, 135 Wis. 279; *Kastner v. Winstanley*, 20 U. C. C. P. 101. Compare *McDougal v. Calef*, 34 N. H. 534 and *Bank v. Sinclair*, 60 N. H. 100, 49 Am. R. 307, and cases in the next section.

24. *Lee v. Dick*, 10 Pet. (U. S.) 482; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524; *Rankin v. Child*, 9 Mo. 673.

as are necessary to secure himself against the principal debtor.²⁵ In others it has been deemed to spring wholly from the peculiar nature of the contract or offer of guarantee, which requires, after the formation of the obligation of the guarantor, by acting upon the offer and as one incident of the contract, that notice should be given the guarantor that the creditor has acted under it, as a condition of the guarantor remaining bound. This view of the law has been well expressed by Knowlton J., in *Bishop v. Eaton*,²⁶ as follows: "The language relied upon was an offer to guarantee, which the plaintiff might or might not accept. . . . It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a sub-

25. *Davis v. Wells*, 104 U. S. 159 and cases cited. *Louisville Co. v. Welch*, 10 How. (U. S.) 461, 475; *Barnes Co. v. Reed*, 84 Fed. 603; *Newman v. Streater*, 19 Ill. App. 594; *Ruffner v. Love*, 33 Ill. App. 601; *Kincheloe v. Holmes*, 7 B. Monroe (Ky.) 5; 45 Am. D. 41; *Lachman v. Block*, 47 La. An. 505; 28 L. R. A. 255; *Howe v. Nickels*, 22 Me. 175; *Winnebago Mills v. Travis*, 56 Minn. 480; *Central Sav. Bank v. Shine*, 48 Mo. 456, 8 Am. R. 112; *Standard Sewing Mach. Co. v. Church*, 11 N. Dak. 420; *Kellogg v. Stockton*, 29 Pa. 460; *Wilkins v. Carter*, 84 Tex. 438.

26. 161 Mass. 499, 42 Am. St. R. 437.

sequent withdrawal of it, if within a reasonable time afterward he notifies the promisor."

It will be readily seen that these views of the law differ, and while they ordinarily lead to the same result, they still may, if pushed to their logical conclusions, lead in certain cases to different results. Thus, under the first view, if A should offer to guarantee B if he made advances to C, it would seem that A could withdraw his offer by notice to B even though B had acted upon it, provided A was ignorant of the fact; while under the second view as expressed in *Bishop v. Eaton*, the guarantee becomes binding when it has been acted upon, subject to the condition that reasonable notice of that fact be given, the giving of it being in the nature of a condition subsequent the non-performance of which will release the guarantor.

§ 39. Same—Absolute Guaranty of Definite Obligation—Notice or Waiver Thereof Implied. As an apparent exception to the more prevalent general rule requiring notice of acceptance where the guaranty is of an obligation to arise between the principal and creditor or obligee in the future, it is held in a number of cases in jurisdictions adopting the American rule that where the proposal can be reasonably interpreted as a direct and positive guaranty of an obligation definite in terms and amount, known to the guarantor, or ascertainable by the exercise of ordinary care, no notice of acceptance by the creditor is necessary,²⁷ and so where the guaranty is direct and absolute, though the time and amount of the advances that will be made under it may be uncertain.²⁸

27. *Kent v. Silver*, 108 Fed. 365, 47 C. C. A. 404; *Kline v. Raymond*, 70 Ind. 271, and cases cited; *Snyder v. Klick*, 112 Ind. 293; *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686; *Manry v. Waxelbaum Co.*, 108 Ga. 14; *Sanders v. Etcherson*, 36 Ga. 404. See also *Lent v. Paddleford*, 10 Mass. 230, 6 Am. D. 119.

28. See *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. R. 845; *Wright v. Griffith*, 121 Ind. 478, 6 L. R. A. 639; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101. See and compare *Davis v. Richards*, 115 U. S. 524; *German Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184, 84 Am. St.

Furthermore proof of actual or direct notice has been held unnecessary where the circumstances of the transaction and of the parties were such that notice or a waiver of it could reasonably be implied as within the intention of the parties, or knowledge could readily be obtained.²⁹ No notice is necessary where the offer expressly waives it.³⁰

§ 40. Stipulations for Notice. In all cases where notice of acceptance of guarantee would not otherwise be required the guarantor may make actual notice, or notice in a specific manner or within a specific time a condition of his liability. No citation of authorities seems necessary in support of so plain a proposition.

§ 41. When Guarantor Must be Notified of Amount due Under Guaranty. We will see in another place that where a guarantee is absolute and relates to a single transaction only, its acceptance or notice of its acceptance, is all that is required in any case, that alone being sufficient to inform the guarantor of the fact and extent of his liability. Where, however, the guarantee is a continuing one, meant to cover a series of transactions occurring at different times and resulting in a balance that may be more or less, depending upon the number and

R. 335, 51 L. R. A. 758. A guaranty by stockholders generally assuming and agreeing to pay all the debts of their corporation, has been construed as an absolute promise of guaranty binding in favor of any who give credit with knowledge of it, irrespective of notice to the stockholders. *Hart v. Wynne*, —Tex. Civ. App.—, 40 S. W. 848. See to similar effect as against directors. *Boyd v. Snyder*, 49 Md. 325; *Marx v. Luling, etc. Ass'n.*, 17 Tex. Civ. App. 408.

29. *King v. Batterson*, 13 R. I. 117, 43 Am. R. 13; *Pearsall Mfg. Co. v. Jeffreys*, 183 Mo. 386; 105 Am. St. R. 496; *Swisher v. Deering*, 104 Ill. App. 572, affirmed in 204 Ill. 203; *First Nat. Bank v. Carpenter*, 41 Ia. 518; *Friedman v. Peters*, 18 Tex. Civ. App. 1. The fact that the parties reside in the same place or are otherwise in close communication has been held in some cases to dispense with, or to indicate a waiver of notice. See *Walker v. Forbes*, 25 Ala. 139, 148; 60 Am. D. 498; *Pearsall Mfg. Co. v. Jeffreys*, supra; *Boyd v. Snyder*, supra. Compare *Craft v. Isham*, 13 Conn. 28. See also Post, sec. 42.

30. *Raleigh Medical Co. v. Laursen* (N. Dak. 1913), 141 N. W. 64.

amount of the transactions that it includes, the guarantor has a right for his own protection to be notified within a reasonable time after the contract is terminated or the transactions are closed, of the balance due from the principal to the creditor thereunder, unless the facts come otherwise to his notice, and if such notice is not given, is released to the extent that he is injured by the want of it.³¹

§ 42. **Form and Sufficiency of Notice—Pleading.** Where notice of the acceptance of a guaranty is required, it must be given within a reasonable time after the offer of guaranty is made, and what is a reasonable time is ordinarily for the jury, under proper instructions, in view of the facts and circumstances of the particular case.³²

No particular form of notice is essential unless specially stipulated for by the guarantor, and it would seem sufficient in view of the reasons for the rule requiring notice of acceptance that the guarantor acquires actual knowledge within a reasonable time after his offer is accepted in the case of a continuing guaranty,³³ or that it

31. See Post, secs. 184, et seq. Wade on Notice, sec. 223, commenting upon the confusion sometimes met with between notice of default under a guarantee, and notice of acceptance thereof. Taussig v. Ried, 35 Ill. App. 439, affirmed in 145 Ill. 488.

32. Seaver v. Bradley, 6 Me. 60; Lowry v. Adams, 22 Vt. 160; Louisville M'fg. Co. v. Welch, 10 How. (U. S.) 461. A delay of two years and nine months was held unreasonable in Mussey v. Rayner, 22 Pick. (Mass.) 223, and so of a delay of three years; Allen v. Pike, 3 Cush. (Mass.) 238. On the other hand, a delay of ten months was not fatal where the principal continued solvent. Seaver v. Bradley, supra, and a notice after two months was held reasonable in Lowry v. Adams, supra. See also Louisville M'fg. Co. v. Welch, 10 How. (U. S.) 461; Dubuque First Nat. Bank v. Carpenter, 34 Ia. 433; Rankin v. Childs, 9 Mo. 673. Compare Craft v. Isham, 13 Conn. 36, 40.

33. Notice of each particular sale, loan or other credit is not required under a guarantee of successive credits unless stipulated for by the guarantor. It is enough that reasonable notice of acceptance is given, Douglas v. Reynolds, 7 Pet. (U. S.) 113; Craft v. Isham, 13 Conn. 36; Paige v. Parker, 8 Gray (Mass.) 211, 214; First Nat. Bank v. Carpenter, 41 Ia. 518, and reasonable notice of default is received. Post, sec. 185.

has been acted on, and to what extent, in the case of a single credit.³⁴

If the offer of guaranty is by mail or is communicated in such a way that acceptance by mail is appropriate, a letter of acceptance, duly posted, properly addressed and postage prepaid, has been held sufficient to bind the guarantor, though it was never received by him.³⁵

It seems that a general averment of due notice is sufficient in cases where it is required, and the question of whether it is reasonable or not is ordinarily for the jury in the light of all the facts and circumstances of the case.³⁶

§ 43. Waiver—New Promise or Part Payment. Even after default in giving notice of the acceptance of a guaranty, the guarantor will be bound if, with knowledge of the facts, he promises expressly to pay, or makes part payment or otherwise recognizes it as a subsisting obligation.³⁷ So, the waiver may take place before default, or may be expressed or fairly implied from the terms of the offer of guaranty itself, and the circumstances of the

34. *German Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184; 84 Am. St. R. 335, 51 L. R. A. 758. Neither would it seem necessary that the notice emanate from the creditor or the principal. Knowledge or notice from any credible source would seem sufficient. *Seaver v. Bradley*, 6 Greenl. (Me.) 60; *Geer Machinery Co. v. Sears*, 119 Ky. 697; *Lynn, etc. Co. v. Andrews*, 180 Mass. 527; *Peoria Rubber Co. v. During*, 85 Mo. App. 131.

35. *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. R. 437, distinguishing *McCullough v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Oaks v. Weller*, 16 Vt. 63. See *Averill v. Hedge*, 12 Conn. 424.

36. *Oaks v. Weller*, supra; *Central Sav. Bank v. Shine*, 48 Mo. 456, 8 Am. R. 112, citing *Lawrence v. McCalmont*, 2 How. U. S. 452; *Walker v. Forbes*, 25 Ala. 139. Supra, note 31.

37. *Reynolds v. Douglas*, 12 Pet. (U. S.) 497; *Farwell v. Sully*, 38 Ia. 387; *Trefethen v. Locke*, 16 La. Ann. 19; *Vanleer v. Crawford*, 2 Swan, 117; *Swisher v. Deering*, 104 Ill. App. 572. See also *Central Sav. Bank v. Shine*, 48 Mo. 456, 8 Am. R. 112. See as to waiver of notice of default, Post, secs. 185, 188.

case³⁸ and an express stipulation for notice of default has been held a waiver of notice of acceptance.³⁹

38. *Bickford v. Gibbs*, 8 Cush. (Mass.) 153; *Hughes v. Roberts*, 24 Ky. L. Rep. 2103; *Peoples Bank v. Lemarie*, 106 La. 429; *Swisher v. Deering*, 204 Ill. 203. See *Acme M'fg. Co. v. Reed*, 197 Pa. 359, 80 Am. St. R. 832. Ante, sec. 39, note 28.

39. *Wadsworth v. Allen*, 8 Gratt. (Va.) 174; 56 Am. D. 137. Contra, *Taylor v. McClung*, 2 Houst. (Del.) 24. Where a contract of guaranty prepared by the obligee recited that the guarantor waived "acceptance and all notice," notice of acceptance was held unnecessary, but that under the rule that doubtful meanings are to be construed most strongly against the party preparing the instrument the obligee must give the guarantor notice of his principal's default. *Shores-Mueller Co. v. Knox*, —Ia.—, 141 N. W. 948 (June 1913)

CHAPTER V.

PRINCIPAL OR CO-SURETY COMPETENT BUT NOT BOUND. CONDITIONAL EXECUTION AND UNAUTHORIZED DELIVERY. FRAUD, DURESS, ILLEGALITY AND OTHER MATTERS AFFECTING ASSENT AND EXECUTION—ESTOPPEL OF SURETIES.

§ 44. **Execution of Contract in General—Conditions—Delivery by Agent.** Where, though the principal is competent, he is not bound owing to some defect inherent in his contract, or because he fails to execute it, or to execute it so as to become liable, the undertaking of the surety will as a rule fail with it unless he intends to be bound in spite of the omission or defect. Even in the latter case he may not be bound where the contract of the principal is illegal or contrary to public policy. The situations in which a competent principal may not be bound to the creditor are ordinarily;

(1) Where the principal has wholly failed to execute the contract, or has so defectively executed it that no liability is imposed upon him, or his contract is subject to some condition not yet fulfilled.¹

(2) Where the principal has been induced by the creditor to enter into the transaction by fraud or undue influence, or by duress, and has avoided his undertaking for that reason, or his contract with the creditor is void for mistake.²

(3) Where his undertaking is contrary to law or public policy.³

The delivery of an instrument or contract of suretyship may, of course, be made by or to an agent duly authorized in that behalf; and the principal himself may be the agent of the sureties to deliver the instrument of

1. See Post, next section.

2. Post, secs. 55, et seq.

3. Post, sec. 58.

suretyship. In fact, if the surety signs a bond or other written contract of suretyship complete and regular upon its face and intrusts it to the principal named therein, the obligees, acting in good faith and with nothing to put them upon inquiry, are entitled to regard him as the agent of the sureties to deliver the same, the sureties, being estopped to deny his authority even though it be wanting in fact.⁴

That delivery is tendered by a stranger, however, is, it seems, a circumstance that should put the obligees upon inquiry as to his authority merely.⁵

§ 45. Failure of Principal or Co-surety to Execute Contract. Where the principal fails utterly to execute the undertaking for which the sureties are to become bound, there is considerable confusion as to the liability of the latter.⁶ If the omission of the principal's signature was intentional and the sureties signed and delivered the instrument of suretyship unconditionally so far as the creditor or obligee was concerned, with knowledge of the facts, they are bound.⁷ If, however, they signed with the understanding, known to the creditor or obligee, that they were not to be bound unless the contract was duly executed by the principal, they are not liable in the absence of due execution by him, his name appearing as obligor,⁸ unless they have in some way estopped them-

4. *Butler v. United States*, 21 Wall. (U. S.) 272; *Dair v. United States*, 16 Wall. (U. S.) 1; *Carter v. Moulton*, 51 Kan. 9, 37 Am. St. R. 259, 20 L. R. A. 309.

5. *Taylor Co. v. King*, 73 Ia. 153, 5 Am. St. R. 666, and cases cited and discussed. See *McCormick Harvester Co. v. McKee*, 51 Mich. 426.

6. If signature by the principal is the plain requirement of the statute, his failure to sign is fatal as to the sureties. *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. R. 425.

7. See *Trustees of Schools v. Sheik*, 119 Ill. 579; 59 Am. R. 830; *Johnston v. Township of Kimball*, 39 Mich. 187, 33 Am. R. 372, and cases throughout this section. *Owen v. Udall*, 39 Neb. 14; *Tully v. Lewitz*, 50 Misc. 350, 98 N. Y. S. 829; *Wright v. Jones*, 55 Tex. Civ. App. 616.

8. *Trustees v. Sheik*, *supra*, and cases throughout this section. See *Hall v. Parker*, 37 Mich. 590, 26 Am. R. 540.

selves from showing that they executed the bond on condition that the principal should also execute it.

A number of cases hold, however, that where the principal appears as a party to the undertaking in the body thereof, his failure to sign, or his failure to sign in such a way as to become legally a party to it, is fatal to the liability of the sureties unless they intended to be bound notwithstanding the failure of the principal to execute the contract, or to execute it so as to be bound. The only serious conflict in the cases on this point appears to be as to the presumptions. In a number of jurisdictions the presumption is that the parties who signed did so on condition that the principal would sign, and the burden of showing a different intention is upon the creditor or obligee.⁹ In others the surety must show that his signing and delivery were in fact conditional upon the execution of the instrument by the principal;¹⁰ and in a few states the surety is held, though the principal did not sign, unless he can show not only a signing

9. *Wild Cat Branch v. Ball*, 45 Ind. 213; *Clements v. Cassilly*, 4 La. An. 380; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Goodyear Co. v. Bacon*, 151 Mass. 460, 8 L. R. A. 486n; *Dole Co. v. Cosmopolitan Co.*, 167 Mass. 481, 57 Am. St. R. 477, and cases cited; *Johnston v. Kimball*, 39 Mich. 187, 33 Am. R. 372; *Hall v. Parker*, 39 Mich. 287, 37 Mich. 590, 26 Am. R. 540; *Martin v. Hornsby*, 55 Minn. 187, 43 Am. St. R. 487; *School Dist. v. Lapping*, 100 Minn. 139, 12 L. R. A. (N. S.) 1105; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. R. 425; *Gay v. Murphy*, 134 Mo. 98, 496, 56 Am. St. R. 496; *Board v. Sweeney*, 1 S. Dak. 642, 36 Am. St. R. 767. This is the usual ruling where the obligation is in form joint instead of joint and several. *Weir v. Mead*, 101 Cal. 125, 40 Am. St. R. 46, note. *School Dist. v. Lapping*, *supra*.

10. *Cooper v. Evans*, 4 Eq. 45; *Hickman v. Fargo*, 1 Kan. App. 695; *Deering v. Moore*, 86 Me. 181, 41 Am. St. R. 534; *Bollman v. Pasewalk*, 22 Neb. 761; *Parker v. Bradley*, 2 Hill, (N. Y.) 584; *Chouteau v. Suydam*, 21 N. Y. 179; *Dillon v. Anderson*, 43 N. Y. 231; *Russell v. Freer*, 56 N. Y. 67; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. R. 131; *Williams v. Marshall*, 42 Barb. (N. Y.) 524; *O'Hanlon v. Scott*, 89 Hun (N. Y.) 44; *Eureka Co. v. Long*, 11 Wash. 161. This would appear to be the proper rule in all cases where the obligation of principal and surety was joint and several or merely several. *Kurtz v. Forqueer*, 94 Cal. 91; *Douglas County v. Bardon*, 79 Wis. 641; *Goodyear Co. v. Bacon*, *supra*.

and delivery conditional upon execution by the principal, but also that the obligee had notice of the condition.¹¹

Similar principles apply where a surety signs an instrument of suretyship on condition that the principal shall procure another or others to become co-sureties with him. In such cases the surety who signs is not bound for any part of the debt if the creditor takes the instrument with knowledge of the condition.¹² But though such a condition exists, if it does not appear on the face of the paper the surety who signs is, by the great weight of authority, absolutely bound by its delivery to a bona fide obligee without notice.¹³

11. *Trustees v. Sheik*, 119 Ill. 579, 59 Am. R. 830; *Woodman v. Calkins*, 13 Mont. 363, 40 Am. St. R. 449; *Cockrill v. Davie*, 14 Mont. 131; *State v. Bowman*, 10 Ohio, 445; *Johnson v. Johnson*, 31 Oh. St. 131. This is particularly true where the principal was bound by law or independent contract for the duties specified in the bond upon which the sureties are sought to be held. See *Star Grocer Co. v. Bradford*, 70 W. Va. 496, 39 L. R. A. (N. S.) 184; and this last rule seems more clearly applicable where the bond is joint and several. *U. S. Fid. Co. v. Haggart*, 163 Fed. 801, 91 C. C. A. 289; *Kineck v. Parchen*, 22 Mont. 519, 74 Am. St. R. 625. Where the surety himself delivers a bond to the obligee from which the principal's signature is lacking, he will be held to have waived any condition requiring such signature. *People v. Carroll*, 151 Mich. 233. In *General Ry. Signal Co. v. Title Guar. Co.* (N. Y.), 98 N. E. 734, this doctrine was applied to a fidelity bond though the condition requiring the principal's signature was express. Compare *Union Ins. Co. v. U. S. Fid. Co.*, 99 Md. 423.

12. *Evans v. Bembridge*, 8 De G. M. & G. 102; *City v. Mellus*, 59 Cal. 444; *Towns v. Kellett*, 11 Ga. 286; *Johnson v. Weatherwax*, 9 Kas. 75; *Readfield v. Shaver*, 50 Me. 36, 79 Am. D. 592; *State v. Moore*, 46 Mo. 377; *Gay v. Murphy*, 134 Mo. 98, 106; *Mullen v. Morris*, 43 Neb. 596; *Blume v. Bowman*, 2 Ired. 338; *Grim v. School Directors*, 51 Pa. 219 (explaining *Sharp v. United States*, 4 Watts, 21); *Loew v. Stocker*, 68 Pa. 226; *Whitaker v. Richards*, 134 Pa. 191, 19 Am. St. R. 684, 7 L. R. A. 749; *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. D. 749. But see *Wells v. Dill*, 1 Mart. N. S. 592.

13. *Dair v. U. S.*, 21 Wall (U. S.) 272; *Butler v. U. S.*, 21 Wall, 272; *Joyce v. Auten*, 175 U. S. 595; *State v. Churchill*, 48 Ark. 426; *Millett v. Parker*, 2 Met. (Ky.) 608; *State v. Peck*, 53 Me. 384; *Benton Co. Bank v. Boddicker*, 105 Ia. 548, 45 L. R. A. 321; *Thomas v. Bleakie*, 136 Mass. 568; *Ward v. Hackett*, 30 Minn. 150, 44 Am. R. 187; *Russell v. Freer*, 56 N. Y. 67; *Gwyn v. Patterson*, 72 N. C. 189; *Belden v. Hurlbut*, 94 Wis. 562, 37 L. R. A. 853, and cases cited and

If, however, the name of another obligor appears as surety in the instrument, the surety who signs will not be liable if he himself signed upon the condition that the party named as co-surety should sign also. The fact that the instrument is not signed by all who are named co-sureties is notice that the signing was, or may have been, conditional upon the others signing with him.¹⁴ But even in such case it seems the surety who signs has the burden of showing that he signed conditionally, even in states where the burden is upon the creditor to show that the surety intended to be bound where the principal failed to sign the instrument in which his name appeared as such, unless there are other circumstances of suspicion.¹⁵

discussed. A multitude of cases to the same effect are collected in Ames cases on Suretyship, pp. 305, 306. *Contra*, *Guild v. Thomas*, 54 Ala. 414; *Sharp v. Allgood*, 100 Ala. 183, and cases cited; *Sessions v. Jones*, 7 Miss. 123. But see also *Graves v. Tucker*, 18 Miss. 9; *State v. Allen*, 69 Miss. 508, 30 Am. St. R. 563; *Warfel v. Frantz*, 76 Pa. 88; *People v. Bostwick*, 32 N. Y. 445. This last case has been much criticised and is doubtless overruled as shown by the notes thereto in the revised edition of the New York Reports. See *Russell v. Freer*, 56 N. Y. 67. The requirement that others shall sign the bond, whether as principal or sureties, must, to vitiate it notwithstanding its delivery, amount to a condition rather than a mere expectation that others will sign, or a request that other sureties shall be obtained. *Douglas Co. v. Bardon*, 79 Wis. 641.

14. *Pawling v. United States*, 4 Cranch (U. S.) 219; *Duncan v. United States*, 7 Pet. (U. S.) 435; *Sharp v. Allgood*, 100 Ala. 183; *State v. Churchill*, 48 Ark. 426; *Allen v. Marney*, 65 Ind. 398, 32 Am. R. 73; *Markland Co. v. Kimmel*, 87 Ind. 560; *Johnson v. Weatherwax*, 9 Kas. 75; *Hall v. Smith*, 14 Bush (Ky.) 604 (but see *Jones v. Shelbyville Co.*, 1 Met. Ky. 58); *Readfield v. Shaver*, 50 Me. 36, 79 Am. D. 592; *Thomas v. Bleakie*, 136 Mass. 568, 571; *Hessell v. Johnson*, 63 Mich. 623; 6 Am. St. R. 334-n; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. D. 400-n; *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. R. 225; *Fertig v. Bucher*, 3 Barr 308; *Fletcher v. Austin*, 11 Vt. 447, 34 Am. D. 698; *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. D. 749. As to delivery of a bond in escrow, see, *Ordinary v. Thatcher*, *supra*.

15. *City v. Mellus*, 59 Cal. 444; *Towns v. Kellett*, 11 Ga. 286; *Johnson v. Weatherwax*, 9 Kan. 75; *Readfield v. Shaver*, 50 Me. 36, 79 Am. D. 592; *Mullen v. Morris*, 43 Neb. 596; *Whitaker v. Richards*, 134 Pa. 191, 19 Am. St. R. 684, 7 L. R. A. 749; *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. D. 749; *Gay v. Murphy*, 134 Mo. 198, and

§ 46. **Other Conditions—Bona Fide Payees and Purchasers.** The rules as to non-execution by the principal or a co-surety apply, in general, to other conditions precedent to the surety's liability. If the surety and principal agree that the instrument shall not be delivered or become binding on the surety until some event has happened or some other condition has been performed, or only for a particular purpose, the obligee who takes the obligation, unconditional upon its face, and bona fide, can enforce it, though the principal delivers it before the condition has been performed or for a purpose other than that authorized.¹⁶ But all essential conditions known to the obligee or agreed to by him must be complied with before the surety will be bound, notwithstanding delivery to the creditor,¹⁷ and the obligee will be chargeable with notice of conditions where the bond is so irregular or incomplete upon its face as to suggest non-performance of some condition, as where it shows a material alteration, or is not executed in conformity to law as in the case of judicial or official bonds.¹⁸

Where the bond on its face named the amounts for which the several obligees should be bound, sureties who had already signed were held released where the obligee

cases cited. But see, *Wells v. Dill*, 1 Mart. (La.) N. S. 592. See also *Hendry v. Cartright*, 72 N. Mex. 91, 8 L. R. A. (N. S.) 1056, and cases cited and reviewed.

16. *Bowman v. Van Kuren*, 29 Wis. 209, 9 Am. R. 554; *Thomas v. Bleakie*, 136 Mass. 568; *Carter v. Moulton*, 51 Kan. 9, 37 Am. St. R. 259, 20 L. R. A. 309; *Gage v. Sharp*, 24 Ia. 15; *Fowler v. Allen*, 32 S. Car. 229, 7 L. R. A. 745; *Merritt v. Duncan*, 7 Heisk (Tenn.) 156; 19 Am. R. 612. The same rule has been applied where the instrument was entrusted to a stranger rather than the principal, to be delivered upon a condition not fulfilled, such bond not having been delivered as an escrow. *Taylor Co. v. King*, 73 Ia. 153; 5 Am. St. R. 666; *McCormick v. McKee*, 51 Mich. 426. But see *Millett v. Parker*, 2 Met. (Ky.) 608; *Nash v. Fugate*, 24 Gratt. (Va.) 202, 18 Am. R. 640.

17. *Braser v. Cox*, 4 Beav. 379, 49 Eng. R. 385.

18. See *Hendry v. Cartright*, 72 N. Mex. 91, 8 L. R. A. (N. S.) and authorities cited and discussed. *Taylor County v. King*, 73 Ia. 157; *Nash v. Fugate*, 32 Gratt. (Va.) 595, 34 Am. R. 780.

accepted the signature of a subsequent signer for a smaller amount than was named in the bond.¹⁹

§ 47. Same—Contract Executed in Blank. Where a surety signs an instrument containing blanks and entrusts it to the principal or a stranger with actual authority to fill it up and deliver it according to his instructions, he will be bound though the principal or third person violates those instructions, provided the creditor or obligee acted in good faith and in ignorance of the facts.²⁰

This rule is plainly applicable to commercial paper in the hands of a holder in due course,²¹ and has been applied where the instrument so executed was under seal and the authority to complete it was by parol.²²

But a number of cases adhere to the strict rule of the common law, that authority to fill blanks in a sealed instrument must, like authority to execute it, be under seal,²³ and hold that if the instrument be under seal and

19. *Ellsmere Brewery Co. v. Cooper*, L. R. 1 Q. B. D. 75. This case may be regarded as involving either a condition or a material alteration.

20. *Butler v. U. S.*, 21 Wall (U. S.) 272; *N. Y. Co. v. Wilcox*, 8 Biss. 197; *Dolbeer v. Livingston*, 100 Cal. 617; *City v. Gage*, 95 Ill. 593, 35 Am. R. 182, (overruling *People v. Organ*, 27 Ill. 27, 79 Am. D. 391); *Donnell Co. v. Jones*, 49 Ill. App. 327; *Chalaron v. McFarlane*, 9 La. 227; *Dover v. Robinson*, 64 Me. 183, 188; *White v. Duggan*, 140 Mass. 18, 54 Am. R. 437-n; *State v. McGonigle*, 101 Mo. 353, 362, 20 Am. St. R. 609-n; *Nesbit v. Albert*, 85 Hun (N. Y.) 211; *Gary v. State*, 11 Tex. App. 527; *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. R. 71. *Contra*, *Cross v. State Bank*, 5 Ark. 525; *Gourdin v. Read*, 8 Rich. 230; *Mills v. Williams*, 16 S. Car. 593, (compare *Fowler v. Allen*, 32 S. Car. 229, 237); *Rhea v. Gibson*, 10 Grat. 215.

21. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. R. 39; *Neg. Inst. Law* (chap. 8, *Con. Laws of N. Y.*, secs. 33, 34).

22. *Gibbs v. Frost*, 4 Ala. 720; *State v. Pepper*, 31 Ind. 76, 85-86; *Wright v. Harris*, 31 Iowa 272; *Lee Co. v. Welsing*, 70 Iowa 198; *Rose v. Douglass Township*, 52 Kas. 451, 39 Am. St. R. 354; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. D. 535; *State v. Young*, 23 Minn. 551; *Greene Co. v. Wilhite*, 29 Mo. App. 459, 77 Am. Dec. 583; *Ex parte Kerwin*, 8 Cow. (N. Y.) 118; *Wiley v. Moor*, 17 S. & R. 438; *Gourdin v. Read*, 6 Rich. (S. Car.) 497, 8 Rich. 230; *Mills v. Williams*, 16 S. Car. 593.

23. *Mechem on Agency*, secs. 94 et seq.

the authority of the principal or other third party to fill blanks is by parol, the surety is not bound, whether the authority actually given is adhered to or not, unless the blanks are filed in the presence of the surety.²⁴

§ 48. **Where Contract of Surety, Principal or Co-Sureties Forged.** Where one procures the guaranty of a contract which he knows to be forged, it is clear that he cannot recover; and a guarantor or surety whose signature is forged, is of course not liable. But a surety or guarantor who executed a contract to which the name of the principal was forged, has been held in favor of a creditor who, like himself, was ignorant of the forgery when the contract of suretyship was signed. He virtually warrants in such cases the genuineness of prior signatures,²⁵ and so where the prior signature of a co-surety was forged and both creditor and surety were ignorant of the fact,²⁶ or it was placed on the instrument after the

24. *U. S. v. Nelson*, 2 Brock (U. S.) 64; *Smith v. Carder*, 33 Ark. 709; *Upton v. Archer*, 41 Cal. 85, 10 Am. R. 266; *Richmond Co. v. Davis*, 7 Blackf. (Ind.) 412; *Lockhart v. Roberts*, 3 Bibb. (Ky.) 361; *Byers v. McClanahan*, 6 Gill. & J. (Md.) 250; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Williams v. Crutcher*, 6 Miss. 71, 35 Am. D. 422; *Barden v. South-erland*, 70 N. Car. 528; *Ayres v. Harness*, 1 Ohio 368, 13 Am. D. 629; *State v. Boring*, 15 Ohio 507; *Famelener v. Anderson*, 15 Ohio St. 473; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. D. 439; *Wynne v. Governor*, 1 Yerg. (Tenn.) 149, 24 Am. D. 448; *McNutt v. Mahan*, 1 Head (Tenn.) 98; *Mosby v. Arkansas*, 4 Sneed (Tenn.) 324; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. R. 153; *Penn v. Hamlett*, 27 Grat. (Va.) 337. •

25. *Veazie v. Willis*, 6 Gray (Mass.) 90; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. R. 147, and cases cited; *Chase v. Hathorn*, 61 Me. 505; *Trevathan v. Caldwell*, 4 Heisk. (Tenn.) 535; *Arthur v. Sherman*, 11 Wash. 254; *Wheeler v. Traders Deposit Bank*, 107 Ky. 653, 49 L. R. A. 315. Compare *Green v. Kindy*, 43 Mich. 279. This is of course familiar law so far as concerns the liability of an indorser of commercial paper to a holder in due course.

26. *York, etc. Co. v. Brooks*, 51 Me. 506; *Stern v. People*, 102 Ill. 540; *Stoner v. Millikin*, 85 Ill. 218, and cases cited, (overruling *Seely v. People*, 27 Ill. 173, 81 Am. Dec. 224); *Wheeler v. Traders Deposit Bank*, supra, and note thereto in 49 L. R. A. 315; *State v. Baker*, 64 Mo. 167, 27 Am. Rep. 214; *Kansas City, etc. Co. v. Murphy*, 49 Neb. 674; *Lombard v. Mayberry*, 24 Neb. 674, 8 Am. St. Rep. 234, and note and cases cited in the opinion.

defendant had signed, though the signing was upon condition that the party whose name was forged should sign as surety also, the creditor being ignorant both of such condition and the forgery.²⁷ But where a person agreed to sign a bond as surety if another would sign in that capacity, and did so upon being shown the forged signature of the latter, it was held, contrary to the weight of reason and authority, that the surety was not bound, though the obligee was ignorant of the forgery.²⁸

§ 49. Estoppel or Preclusion of Surety to Question Validity of Principal's Contract or His Own Liability.

We shall see in discussing official and judicial bonds, and those of executors, administrators and guardians, that the sureties thereon are estopped, as a rule, to question the validity of the principal's appointment,²⁹ or to show that judicial proceedings in which they become liable were irregular,³⁰ or that the requisite preliminary steps were omitted or improperly taken.

But sureties otherwise than upon judicial and official bonds may be estopped to assert the invalidity of the principal's undertaking, to shield themselves from liability. Thus, conformably to the general principle governing estoppel by deed, both the principal and the surety upon a bond will be estopped to deny the plain and relevant recitals of the undertaking, in the absence of fraud or mistake,³¹ and a surety on the bonds of a cor-

27. *Klaman v. Malvin*, 61 Ia. 752; *Mathias v. Morgan*, 72 Ga. 517, 53 Am. R. 847; *Sullivan v. Williams*, 43 S. Car. 489, and authorities cited. See also, *Hunter v. Fitzmaurice*, 102 Ind. 449.

28. *Southern Cotton Oil Co. v. Bass*, 126 Ala. 343. See also, *Sharp v. Allgood*, 100 Ala. 183. To the same effect are the overruled cases of *Lynn Co. v. Ferris*, 52 Mo. 75, 14 Am. R. 389, and *Pepper v. State*, 22 Ind. 399, 85 Am. D. 430.

29. Post, secs. 260.

30. Post, secs. 316, 337.

31. Post, secs. 260, 310, 331. See *Dult v. Admr. Genl. of Bengal*, L. R. 35 Indian App. Cas. 109; *Hoffman v. Fleming*, 66 Oh. St. 143, collecting many authorities. *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192 (1907); *Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 129 Am. St. R. 971. Contra where the court appointing the prin-

poration is estopped to deny its legal existence or its capacity to make them, so long as they are not positively illegal or prohibited.³²

Furthermore, though a guaranty is by simple contract, the guarantor will be estopped to question the validity of the principal contract to escape liability in favor of one to whom he has assigned it for value,³³ or who has taken it on the strength of his absolute and unconditional guaranty.³⁴

§ 50. Waiver and Estoppel as Applied to Corporate Surety Bonds. The doctrines of waiver and estoppel familiar to insurance law are generally applicable to guaranty, fidelity and contract bonds of surety companies. Thus, the company will be estopped, as a rule, to urge any fact, aside from positive illegality or the actual bad faith of the beneficiary, known to it when its bond was delivered as a completed contract or the premium accepted by it, as a ground for maintaining that the bond was invalid at its inception;³⁵ and if, with

cipal had no jurisdiction, because of a prior appointment to the same office, unrevoked. *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154. Compare *Post*, sec. 337.

32. See *Ante*, sec. 25, as to *ultra vires* contracts of principal. *Mayor v. Harrison*, 30 N. J. L. 73; *City of St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. R. 764.

33. *Zabreskie v. R. R. Co.*, 23 How. (U. S.) 399; *Remsen v. Graves*, 41 N. Y. 475; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166, 169. See *Mann v. Eckford's Exrs.*, 15 Wend. (N. Y.) 502.

34. *Hohn v. Jamieson*, 173 Ill. 295, 45 L. R. A. 846; *Purdy v. Peters*, 35 Barb. (N. Y.) 239; *Kent v. Silver*, 108 Fed. 365, 47 C. C. A. 404. See *Ante*, sec. 48, for cases where the signature of the principal or a co-surety were forged.

35. *Sinclair v. Nat. Sur. Co.*, 132 Ia. 549; *Farmers, etc. Co. v. U. S. Fid. & Guar. Co.*, 77 Neb. 144. Though it is an express condition of the bond that the company shall not be bound unless it is signed by the risk, if the company takes the separate contract of the risk to indemnify it and mails the bond to the obligee without the risk's signature, the requirement of the bond is waived. *General Ry. Signal Co. v. Title Guar. Co.* (N. Y.), 98 N. E. 734. See *Mudge v. Sup. Court Indep. Order of Foresters*, 149 Mich. 467, 14 L. R. A. (N. S.) 279, and note as to estoppel of company to set up fraudulent misrepresentations where agent executing the bond was a party to the fraud of the

knowledge of a cause of invalidity subsequently acquired, it continues to accept premiums afterward accruing, or otherwise recognizes the bond as a subsisting obligation it will be deemed to have waived the defect.³⁶

The doctrines of waiver and estoppel, however, are likewise applicable to breaches of such conditions or promissory warranties as are, by the terms of the bond, or by law, required to be observed or performed in order that the liability of the company shall continue to cover the risk,³⁷ and to such also as are precedent to the right to recover for a loss or default that has already transpired and for which the company would otherwise be liable.³⁸

§ 51. Fraud of Creditor Upon Surety. Where the surety is induced to sign by fraud of the creditor, or by fraud to which the creditor is a party, or of which he has knowledge when he receives the surety, he is not bound.³⁹

If there is a willful false representation or the active concealment of a material fact, there is little or nothing that is special to the subject in hand. The principal question under this head is as to the creditor's duty to make disclosure. The general rules on this subject where inquiry is made by the surety before signing have been well stated as follows: "The law is that if a person who contemplates becoming surety to another for the pay-

beneficiary, and showing that there is neither waiver nor estoppel in such cases unless the principal had notice of the fraud.

36. But it has been held no waiver of fraud at the inception of the policy that the company sent an agent to examine the risks books and took steps to apprehend the risk, no prejudice to the obligee having resulted therefrom. *Nat. Bank v. Fidelity & Cas. Co.*, 89 Fed. 819.

37. *Crystal Ice Co. v. United Sur. Co.*, 159 Mich. 102. These matters are considered elsewhere. See Post, sec. 208 as to supervision of risk.

38. *Goldman v. Fid. & Dep. Co.*, 125 Wis. 390. Post, 188.

39. See *Stone v. Compton*, 5 Bing. N. C. 142; *Marchman v. Robertson*, Taylor & Company, 77 Ga. 40, and cases throughout this section, and in the note to *Fassnacht v. Emsing Gagen Co.*, 63 Am. St. R. 322, 327.

ment of money or the performance of any act by a third person applies to the creditor or person to whom the security is to be given for information as to the nature, extent and risk of the obligation, or the circumstances, condition or character of such third person, the creditor, if he undertakes to give the information, is bound to disclose every material fact within his knowledge affecting the proposed liability. If the creditor conceal any fact unknown to the proposed surety, which, had he known it, would have deterred him from becoming surety (the latter not having the present means of ascertaining the fact, or, having such means, if artifice be used to mislead him or throw him off his guard), it is fraud upon him, and relieves him from his obligation. Especially is this so where the obligation of suretyship is entered into at the request of the person to whom the security is given. In such a case perfect good faith is required of him who is to be benefitted by the transaction, if he assumes to give the information; and if that obligation is not observed by him (the surety not having other present means of information), the creditor cannot successfully invoke the protection of the maxim "caveat emptor" to shield him from the consequences of his fraud.⁴⁰

The contract of suretyship, however, unlike the contract of insurance, is not in strictness *uberrimae fidei*, or one in which there is an obligation, irrespective of some fiduciary relation between the parties, to make full and voluntary disclosure of all matters known to the creditor that would or might be material to the surety's risk, in the absence of inquiry by the surety. At the same time, "very little said that ought not to have been said, and very little not said that ought to have been said," will render the surety's contract voidable.⁴¹

40. Lyon, J. in *Remington Machine Co. v. Kezertee*, 49 Wis. 409. See also, *American Bonding & Trust Co. v. Burke*, 36 Col. 49; *Bank of Monroe v. Anderson Bros.*, 65 Ia. 692, 701, and cases cited.

41. See *Davis v. London, etc. Co.*, 8 Ch. Div. 469, (1878); *Hamilton v. Watson*, 12 Cl. & F. 117 (1845); *Lee v. Jones*, 17 C. B. (N. S.)

Where, therefore, one offers himself as surety making no inquiry as to the character of the principal or the circumstances of the risk, the creditor or obligee is not bound to disclose to him anything unconnected with the transaction in which he is about to engage that will render his position more than ordinarily hazardous, unless, perhaps it relates to the dishonesty of the principal in the relation or employment to which the suretyship refers. Thus, while the creditor was held bound to inform the surety that iron, for the price of which the surety became bound, was to be supplied to the principal at greater than the market price, the excess to go in liquidation of a prior debt due the creditor from the principal, for this was an unusual circumstance directly connected with the transaction itself,⁴² it is not his duty to inform the surety of the insolvency of the principal,⁴³ nor of the fact that he is indebted to the creditor on other accounts.⁴⁴ But it is a fraud upon the surety for a creditor to receive him as such upon a promissory note given under a composition agreement, where such creditor, unknown to the surety, was to have a secret preference over other creditors of the principal, on the ground that such a preference would enable the other creditors to avoid the set-

482; *London Gen'l Omnibus Co. v. Holloway*, 2 K. B. D. (1912), 72, 82; *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 93, 98, and cases cited and reviewed. *Domestic Sewing Mach. Co. v. Jackson*, 15 Lea (Tenn.) 418. As to corporate surety bonds, see Post, sec. 52.

42. *Pidcock v. Bishop*, 3 L. J. K. B. 109, 3 B. & C. 605. See also, *Lee v. Jones*, 17 C. B. (N. S.) 482; *Stone v. Compton*, 5 Bing. (N. C.) 142. Where the creditor knew that the surety believed that the note he guaranteed was for money to be advanced, he was held not bound where the creditor concealed the fact that it was in part for a pre-existing debt: *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 63 Am. St. R. 322.

43. *Magee v. Manhattan Co.*, 92 U. S. 93, and cases cited and reviewed; *Van Arsdale v. Howard*, 5 Ala. 596; *Farmers Bank v. Braden*, 145 Pa. 473; *Ham v. Greve*, 34 Ind. 18; *Bank of Monroe v. Anderson Bros.*, 65 Ia. 692.

44. *North British Ins. Co. v. Lloyd*, 10 Exch. 523; *Hamilton v. Watson*, 12 Cl. & F. 102; *Palatine Ins. Co. v. Crittenden*, 18 Mont. 413; *Farmers, etc. Bank v. Braden*, 145 Pa. 493; *Domestic Sewing Mach. Co. v. Jackson*, 15 Lea (Tenn.) 418.

tlement and thus increase the surety's risk by impairing the ability of the principal to pay the note or to indemnify the sureties if they paid.⁴⁵ On the other hand non-disclosure of the fact that a lessee for whom the surety signed was in arrears on a prior lease was held no defense.⁴⁶ Neither does it seem to be necessary to disclose the fact that the principal was gambling or speculating during the prior employment.⁴⁷

The dishonesty of the employee in the employment is so comparatively rare, and his continuance in the employ of a principal who is aware of it is so unusual, however, that it is, by the weight of authority, the duty of the creditor or obligee who receives a surety for the future fidelity of an officer, agent or employe, to disclose to him the fact of the principal's prior dishonesty in the same office or employment, if known to him, although no inquiry is made by the surety upon that or any other matter connected with the risk,⁴⁸ and withholding knowledge of dishonesty, as distinguished from defaults or indebtedness not implying dishonesty, will avoid the contract, though the non-disclosure was without actual fraudulent intent.⁴⁹

45. *Powers Dry Goods Co. v. Harlan*, 68 Minn. 193, 64 Am. St. R. 460. Compare *Warren v. Branch Bank*, 15 W. Va. 21.

46. *Roper v. Cox*, L. R. 10 Q. B. 200; *Wythes v. Labouchere*, 3 D. G. & J. 592, 608; *Palatine Co. v. Crittenden*, 18 Mont. 431.

47. *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. R. 231; *Warren v. Branch Bank*, 15 W. Va. 21.

48. *Railton v. Mathews*, 10 Cl. & F. 934; *Smith v. Bank of Scotland*, 1 Dow. 272; *London Gen. Omnibus Co. v. Holloway*, 2 K. B. D. (1912) 72, reviewing the English cases; *Guardian, etc. Co. v. Thompson*, 68 Cal. 208; *Anaheim Co. v. Parker*, 101 Cal. 483; *Wilson v. Monticello*, 85 Ind. 10; *Bank v. Anderson Co.*, 65 Iowa 692; *Franklin Bank v. Cooper*, 39 Me. 542, 36 Me. 179; *Traders' Co. v. Herber*, 67 Minn. 106; *Third Bank v. Owen*, 101 Mo. 558, 582, and cases cited; *Harrison v. Lumbermen Co.*, 8 Mo. App. 37; *Howe Co. v. Farrington*, 82 N. Y. 121; *Ludekens v. Pscherhofer*, 76 Hun (N. Y.) 548; *U. S. Co. v. Salmon*, 91 Hun (N. Y.) 535; *Dinsmore v. Tidball*, 34 Ohio St. 411; *Smith v. Josselyn*, 40 Ohio St. 409; *Wayne v. Commercial Bank*, 52 Pa. 343, 350; *Herbert v. Lee*, 118 Tenn. 133, 12 L. R. A. (N. S.) 247, and note.

49. *London Gen. Omnibus Co. v. Holloway*, *supra*. Compare *Howe Mach. Co. v. Farrington*, 82 N. Y. 123; *McKenzie v. Ward*, 58 N. Y. 541; *Anaheim v. Parker*, *supra*; *Sherman v. Harbin*, 125 Ia. 174, 181.

A very respectable number of cases appear to hold, however, that the creditor or obligee is under no obligation to disclose the fact that the principal is already in default in the same employment where the surety voluntarily offers himself without inquiry,⁵⁰ though in some of them there was, or had been, a mere 'shortage in the accounts of the principal without proof of positive dishonesty on his part.⁵¹ And it seems to be generally agreed that in the absence of inquiry mere want of diligence, skill or punctuality as distinguished from want of integrity, is not a circumstance that the obligee is bound to disclose.⁵²

In any event the creditor must have knowledge of the misconduct of the principal or belief in it founded upon reasonable information, in order that its non-disclosure shall constitute a fraud, and negligence on his part in not discovering it does not change the rule.⁵³

50. *Aetna Ins. Co. v. Mabbett*, 18 Wis. 667; *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. R. 60; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93; *Home Ins. Co. v. Holway*, 55 Ia. 571, 39 Am. R. 179; *Lake v. Thomas*, 84 Md. 608; *Watertown Sav. Bank v. Mattoon*, 78 Conn. 388; *Sherman v. Harbin*, 125 Ia. 174, 181. See also, *J. A. Tolman Co. v. Butt*, 116 Wis. 597.

51. *Wilmington C. A. R. Co. v. Ling*, 18 S. Car. 116; *Atlantic & Pacific Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. R. 621; *Bostwick v. Van Voorhis*, 91 N. Y. 353. Compare *Lee v. Jones*, 17 C. B. (N. S.) 482; *Smith v. Josselyn*, 40 Oh. St. 409; *London Gen. Omnibus Co. v. Holloway* (1912), 2 K. B. 72; *Magee v. Manhattan Life Ins. Co.*, supra.

52. See *London Gen. Omnibus Co. v. Holloway*, 2 K. B. D. (1912), 72, and cases cited and discussed; *Atlas Bank v. Brownell*, 9 R. I. 169, 11 Am. R. 231; *Screwman's Ass'n v. Smith*, 70 Tex. 168; *Home Ins. Co. v. Holway*, 55 Ia. 571, 39 Am. R. 179; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. R. 196; *Domestic Sewing Mach. Co. v. Jackson*, 15 Lea (Tenn.) 418; *Herbert v. Lee*, 118 Tenn. 133, 12 L. R. A. (N. S.) 247. See for similar principles as to disclosure of subsequent defaults, Post, secs. 207, 208.

53. *Wayne v. Commonwealth Nat. Bank*, 52 Pa. 343; *Dinsmore v. Tidball*, 34 Oh. St. 411, 419; *Anaheim v. Parker*, 101 Cal. 483; *Tapeley v. Marten*, 116 Mass. 275; *Browne v. Mt. Holly Bank*, 45 N. J. L. 360; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Home Ins. Co. v. Holway*, 55 Ia. 571, 39 Am. R. 179, and cases cited in the next section. Compare *Graves v. Lebañon Bank*, 10 Bush. (Ky.) 23, 19 Am. Rep. 50; *Nat. Bank v. Equitable Trust Co.*, 223 Pa. St. 328.

§ 52. **Same—Concealment, Misrepresentation and Warranty as Affecting Surety Bonds.** The doctrines of misrepresentation, concealment and warranty applicable to other insurance contracts apply generally to corporate guaranty, fidelity and contract bonds. So far as concealment is concerned, however, the strict rule of life and marine insurance which makes it incumbent upon the insured under penalty of forfeiture to disclose every fact material to the risk, whether inquired about or not, or whether the non-disclosure was intentional or not, does not apply. Indeed, in view of the methods employed by surety companies and their opportunities for inquiry and investigation the rules as to concealment and misrepresentation seem to be substantially the same as in the case of ordinary or private sureties in the absence of special conditions in their contracts. Upon this principle, the obligee is not bound in the absence of inquiry or a warranty to disclose mere irregularities not amounting to bad faith or dishonesty on the part of the risk,⁵⁴ nor, it seems, mere suspicion of graver misconduct,⁵⁵ or misconduct or irregular personal habits outside the employment,⁵⁶ though knowledge of the positive dishonesty of the principal must of course be disclosed whether the bond is designed to cover past or future defaults, or both, and it appears to be immaterial that the non-disclosure was not intentionally fraudulent.⁵⁷ The

54. *Supreme Council v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96; *Atlantic & Pac. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. R. 621; *Aetna Indemnity Co. v. Schroeder*, 12 N. Dak. 110.

55. *Am. Surety Co. v. Pauly*, 170 U. S. 144.

56. *Aetna Indemnity Co. v. Schroeder*, *supra*, and cases cited.

57. The cases on this point are comparatively few. See, however, *London Gen. Omnibus Co. v. Holloway* (1912), 2 K. B. 72; *Glidden v. U. S. Fid., etc. Co.*, 198 Mass. 109; *National Bank v. Equitable Trust Co.*, 223 Pa. St. 328. In this last case the statements were made in response to inquiry by the company, and though there was no positive knowledge of delinquency, there was negligence on the part of the bank. To similar effect see *Poultry Producer's Union v. Williams*, 58 Wash. 64, 137 Am. St. R. 1041, holding that knowledge of the falsity of the statement of a material fact inquired about is not essential to render the policy void. Contra where made under a mistake as to

defense of concealment, however, has no application to the bonds of public officials.⁵⁸

So far as positive false statements of the beneficiary are concerned, the general rule of insurance law applies, and if such statements are made and are material to the risk, and relied upon by the company, the bond is avoided though they involved no breach of warranty or condition and no dishonesty on the part of the obligee.

§ 53. Same—Statements or Representations Amounting to Warranties or Conditions of the Contract—Power of Officer or Agent of Corporate Obligor to Make. Where the bond or policy of a surety company expressly provides that the statements contained in the application or certificate of the beneficiary as to the character or circumstances of the risk shall be deemed warranties or conditions of the contract and part of the contract itself and the basis or inducement of it, such statements are warranties or conditions and must be substantially if not literally true, or substantially if not literally complied with, whether material or not, in order that the obligee may recover,⁵⁹ and this is particularly true where

the facts. *Title Guar. Co. v. Nichols*, 224 U. S. 346; *Aetna Indemnity Co. v. Farmers Nat. Bank*, 169 Fed. 737, 95 C. C. A. 169; *Title Guar. Co. v. Fulton Bank*, 89 Ark. 471, 33 L. R. A. (N. S.) 676; *Southern Surety Co. v. Tyler*, 30 Okla. 116.

58. Post, sec. 276.

59. *Guarantee Co. v. Mechanics Sav., etc. Co.*, 183 U. S. 402, 423; *American Credit Indemnity Co. v. Carrolton Furniture Co.*, 36 C. C. A. 671, 95 Fed. 111; *Carstairs v. Am. Bonding Co.*, 116 Fed. 449, 54 C. C. A. 854; *Rice v. Fidelity & Dep. Co.*, 103 Fed. 427; *Issaquah Coal Co. v. U. S. Fid. & Guar. Co.*, 126 Fed. 89; *Willoughby v. Fidelity & Deposit Co.*, 16 Okla. 546, 7 L. R. A. (N. S.) 548, and cases cited; *Frost Guar. Ins. (2nd Ed.)*, sec. 64; *Fid. & Guar. Co. v. Ridgley*, 70 Neb. 622; *Model Mill Co. v. Fidelity, etc. Co.*, 1 Tenn. Ch. App. 365. In order to make the statements of the obligee warranties, it is not absolutely necessary that the term warranty be used. They must be incorporated into the contract either directly or by reference, however, and if this is not done they are representations merely. *Dime Sav. Bank v. Am. Sur. Co.*, 68 N. J. L. 440; *Livingston v. Fidelity & Deposit Co.*, 76 Oh. 253. And the language of the bond must be explicit to the effect that they are a part and basis of the contract, and it has recently been held that where a fidelity bond provided that the statements of the em-

the statement is responsive to a direct inquiry by the company.⁶⁰

A statute providing that statements in an application for insurance shall be deemed representations and not warranties, and that no representation, unless material or fraudulent shall prevent recovery, has been held applicable to corporate fidelity bonds.⁶¹

Turning now to the question of authority to bind an obligee corporation by representations or by statements in the nature of warranties or conditions of the contract, it has recently been held that where statements and representations upon which a bond is issued by the company and accepted by the obligee are in the nature of warranties or conditions, being in writing and a part and basis of the bond by the express terms thereof, such written application or statement forms a part of the contract and must be construed with it, and the surety com-

ployer should "constitute *part of the basis and consideration of the contract*," it was not sufficiently specific and unequivocal to make such statements warranties, and that they were representations merely. *Title Guar. Co. v. Bank of Fulton*, 89 Ark. 871, 33 L. R. A. (N. S.) 471. See *Goldman v. Fid. & Dep. Co.*, 125 Wis. 390. And it has been recently held that where an application provided that the answers therein should be warranties as to the supervision to be exercised over the risk, that they were superseded by the issuance of a bond containing less onerous requirements in that respect and which did not incorporate the statements or requirements of the application by reference. *United Am. Fire Ins. Co. v. Am. Bonding Co.*, 146 Wis. 573, 580, 581. Where the answers are expressed by the employer as being "to the best of his knowledge and belief," there must be bad faith to avoid the policy. *Mechanics Sav. Bank, etc. Co. v. Guarantee Co.*, 68 Fed. 459, with which compare 183 U. S. 402. See also, *Goldman v. Fid. & Guar. Co.*, supra. See Post, sec. 208, as to supervision of the bonded employe.

60. *Carrolton Furniture Co. v. Indemnity Co.*, 124 Fed. 25; *Guarantee Co. v. Nat. Bank*, 95 Va. 480; *Am. Bonding Co. v. Burke*, 36 Col. 49, and authorities cited; *Sullivan v. Fraternal, etc. Union*, 73 N. Y. Supp. 1094, 36 Misc. 538, citing *Armour v. Ins. Co.*, 90 N. Y. 450.

61. *U. S. Fid. & Guar. Co. v. Foster Bank*, 148 Ky. 776. See Ky. St., sec. 639 (Russell's St., sec. 4286), construed in *Blanke v. Citizens Life Ins. Co.*, 145 Ky. 332. See also, *Champion, etc. Co. v. Am. Bonding Co.*, 115 Ky. 863, 103 Am. St. R. 356; *First Nat. Bank v. Fid. & Guar. Co.*, 110 Tenn. 10, 100 Am. St. R. 765.

pany may take advantage of the falsity of the statements therein contained, though the officer or agent of the obligee had no express or implied authority to make them. The obligee cannot insist upon the benefits of the contract while repudiating the burdens and conditions imposed by its very terms.⁶²

§ 54. Construction of Warranties and Conditions in Corporate Surety Bonds. Pursuant to the general rule of insurance law and the rule of liberal construction in favor of the obligee already stated, warranties in corporate surety bonds will be construed to refer to material matters calculated to affect the risk rather than to immaterial and unimportant ones which have no bearing thereon, unless the language of the bond is plain to the contrary.

Thus, in *American Bonding Co. v. Morrow*,⁶³ a warranty that audits of the risk's accounts would be made monthly was satisfied by audits made at any time during each month, and further, that a warranty that the risk was not engaged in any other business or employment than that guaranteed was not breached by trivial and incidental duties connected with some other business not

62. *Willoughby v. Fidelity & Deposit Co.*, 16 Okla. 546, 7 L. R. A. (N. S.) 548, and note; *Warren Deposit Bank v. Fidelity & Deposit Co.*, 116 Ky. 38. To the same effect, see also, *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342; *Guarantee Co. v. Mechanics Savings, etc. Co.*, 183 U. S. 402. The case of *Am. Sur. Co. v. Pauly*, 170 U. S. 156, is clearly distinguishable from the above cases in the fact, among others, that the statements preceding the issuance of the bond were not made a part of it, and were in the nature of a spontaneous recommendation of one corporate officer by another who had no authority to act for the obligee in the matter, and the fact that when the bond was presented to and accepted by the obligee, it had no knowledge that the representations had been made by its president, who together with the risk, were already engaged in wrecking the obligee bank. See also, *Sherman v. Harbin*, 125 Ia. 175, decided on similar principles. See *Willoughby v. Fidelity & Deposit Co.*, *supra*, where the Pauly case is considered and distinguished. See also, *Perpetual Bldg. & Loan Assn. v. U. S. Fid. & Guar. Co.*, 118 Ia. 729. For facts constituting an implied authority in the cashier to make representations as to the risk, see *Nat. Bank v. Equitable Trust Co.*, 223 Pa. St. 328.

63. 80 Ark. 49.

interfering with the bonded employment, as acting as secretary of the board of directors of a local building association, or writing a little insurance in spare hours.⁶⁴

On the other hand a warranty that the books or accounts of the risk have been audited and found correct is breached if the risk was at that time a defaulter.⁶⁵ So, as to statements concerning the past conduct of the risk as to "anything known or heard unfavorable as to the habits or associates of the risk," or "any matter concerning him about which you deem it advisable to make inquiry, past or present," and the insured answered in the negative, knowing that the risk had been speculating.⁶⁶

§ 55. Fraud Practiced by the Principal or a Stranger Upon the Surety. Fraud practiced by the principal upon the surety, however, to which the creditor or his agent was in no sense a party, will not as a rule, effect the liability of the surety to the creditor. From this proposition there is no dissent, at least where creditor or obligee has already acted on the faith of the guaranty, the principle plainly being that where one of two innocent persons must suffer by the wrong of a third, it shall be him who put it in the power of the latter to inflict the injury.⁶⁷ The only remedy of the surety in such cases is by action against his principal.

64. A statement in an application that the amount of money in the hands of the risk at any one time amounts to "about \$50" has been held too indefinite to constitute an absolute warranty and will be construed to refer to the general and customary course of the obligee's business. *Goldman v. Fid. & Dep. Co.*, 125 Wis. 390.

65. *Issaquah Coal Co. v. U. S. Fid. & Guar. Co.*, 126 Fed. 89; *Carstairs v. Am. Bonding & Trust Co.*, 116 Fed. 449; *Am. Bonding & Trust Co. v. Burke*, 36 Col. 49; *Glidden v. U. S. Fid. & Guar. Co.*, 198 Mass. 109; *Guthrie v. Fid. & Dep. Co.*, 14 Okla. 636.

66. *Guar. Co. of N. A. v. Mech. Sav. Bank & Tr. Co.*, 183 U. S. 402.

67. *Mastagart v. Watson*, 3 Cl. & Fin. 525, 542, 543; *Spencer v. Handley*, 4 M. & G. 414, 43 E. C. L. 218; *Stone v. Compton*, 5 Bing. 142; *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. R. 731, 21 L. R. A. 409; *Home Ins. Co. v. Holway*, 55 Ia. 571, 39 Am. R. 179; *Ladd v. Board*, 80 Ill. 233; *Lucas v. Owens*, 113 Ind. 521. Under a bond for the faithful performance of a building contract, it was held immaterial that the

It seems, however, that if the surety signs by reason of the fraud of the principal as to the nature of the instrument of guaranty, he will be bound to the creditor only where his want of ordinary care and prudence made the deception possible.⁶⁸ The foregoing principles doubtless apply where the fraud is of a third person.⁶⁹

§ 56. Fraud by Creditor or Obligee upon Principal.

Where no fraud is practiced upon the surety, he cannot, by the weight of authority, avail himself of fraud practiced upon the principal by the creditor, unless the principal chooses to rescind for that cause. The defense of fraud in such cases is personal to the principal and it is for him to say whether he will rescind because of it, or affirm the contract and sue for deceit. Until the principal has elected to rescind, the surety remains bound, but if the principal rescinds the surety may defend.⁷⁰ But the surety is not bound where the fraud goes to the very existence of the principal obligation, as where it results in a total failure of consideration.⁷¹

Where the contract of the principal is absolutely void for mistake that of the surety will ordinarily fall with it save perhaps as against a holder in due course under the rules of the law merchant.

owner was notified of the contractor's fraud in procuring it, before building operations were commenced. *Ripley Bldg. Co. v. Coors*, 37 Col. 78.

68. *Page v. Krekey*, 137 N. Y. 307, 21 L. R. A. 409, 33 Am. St. R. 731, and cases cited; *Walker v. Ebert*, 29 Wis. 194, 9 Am. R. 548, and cases cited.

69. *State v. Sooy*, 39 N. J. L. 135; *Brown v. Davenport*, 76 Ga. 799. See also, *Am. Sur. Co. v. Pauly*, 170 U. S. 156.

70. *Henry v. Daly*, 17 Hun (N. Y.) 210, and cases cited; *Brown v. Wright*, 7 T. B. Mon. (Ky.) 397; *Walker v. Gilbert*, 15 Miss. 456; *Macey, Henderson & Co. v. Heger*, 195 Pa. 125; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Hazard v. Irwin*, 18 Pick (Mass.) 95. See *City Nat. Bank v. Jordan*, 139 Ia. 499; *Bryant v. Crosby*, 36 Me. 570. See also, *Counterclaim and Set-off*, Post, sec. 194. *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

71. See *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Hagar v. Mounts*, 3 Blackf. (Ind.) 57; *Bryant v. Crosby*, 36 Me. 562, 58 Am. D. 767; *Henry v. Daly*, 17 Hun (N. Y.) 210, and cases cited.

§ 57. **Duress as Affecting Liability of Sureties.** It is not our purpose to inquire generally what constitutes duress, for this is familiar to all who are conversant with the general law of contract. Being a species of fraud in which compulsion takes the place of deception, its effect upon the contract of suretyship must be practically the same as that of fraud in its narrower sense. It therefore follows from what has been said about fraud, that duress of the surety by the principal is no defense to an action by the creditor who accepted the surety in good faith,⁷² unless, perhaps, it is so complete and absolute as to make the principal a mere automaton and to render the principal contract, in view of some courts, absolutely void.⁷³

Where duress is practiced upon the principal, however, there is some uncertainty and conflict as to the right of the surety to avail himself of that defense. By what appears to be the weight of authority in this country, the surety may do so unless he signed with knowledge of the duress, upon the ground that if he were compelled to pay, he could recover indemnity of his principal thus indirectly compelling the principal to pay what the creditor would have no right to recover from his directly, and that the creditor would thus be enabled to profit by his own wrong.⁷⁴ But where the surety knows that his principal contracted under duress and chooses voluntarily to become bound notwithstanding, he is liable.⁷⁵ Duress practiced by the creditor upon the

72. Ante, sec. 57. *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. R. 446, and note.

73. See *Fairbanks v. Snow*, supra.

74. *Hawes v. Marchant*, 1 Curtis 136; *Griffith v. Sitgreaves*, 90 Pa. 161; *Patterson v. Gibson*, 81 Ga. 802, 12 Am. St. R. 356; *Owens v. Mynatt*, 1 Heisk. (Tenn.) 675; *Osborne v. Robbins*, 36 N. Y. 365; *Strong v. Grannis*, 26 Barb. (N. Y.) 122. In some of these cases there was abuse of legal process against the principal or other circumstances of positive illegality beyond simple duress. See *Osborne v. Robbins*, supra; *Strong v. Grannis*, supra.

75. *Hazard v. Griswold*, 21 Fed. 178; *Griffith v. Sitgreaves*, supra, and authorities cited; *Robinson v. Gould*, 11 Cush. (Mass.) 55. See also, *Patterson v. Gibson*, 81 Ga. 802, 12 Am. St. R. 356.

surety of course affords the latter a complete defense, whether the principal is bound or not.⁷⁶

A number of cases, however, appear to hold that inasmuch as duress must be directed toward the promisor or one nearly related to him,⁷⁷ and is in its nature a personal defense, that duress of the principal alone is no answer to an action against the surety, even where he signed without knowledge of it, at least where the principal has not rescinded on account of the compulsion.⁷⁸ But even in these jurisdictions it would seem clear that where the surety contracted without knowledge of the duress of his principal, and the latter has rescinded for that cause, it will be a good defense to an action against the surety.⁷⁹ It is hardly necessary to say that a surety upon a contract of the law merchant, and a fortiori a technical indorser of the law merchant, cannot plead duress of his principal, nor in most jurisdictions, even his own duress, as against a holder for value in due course.

§ 58. Illegality as Affecting the Liability of Sureties.

Where the obligation for which the guarantor or surety purports to be bound is illegal or against public policy, it is usually void, and the contract of the guarantor or surety will fall with it,⁸⁰ and there is no estoppel against the latter to show such illegality even though he knew of it when he signed.⁸¹ Thus, where the principal contract is tainted with usury, the surety may defend on

76. *Osborne v. Robbins*, 36 N. Y. 365.

77. See *Plummer v. People*, 16 Ill. 358; *Harris v. Carmody*, 131 Mass. 51, 41 Am. R. 188-n.

78. *Huscombe v. Standing*, Cro. Jac. 187; *Oak v. Dustin*, 79 Me. 23, 1 Am. St. R. 281. See *Patterson v. Gibson*, 81 Ga. 802, 12 Am. St. R. 356.

79. See in the analogous case of fraud on the principal and rescission by him. *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

80. 1 *Brandt Sur. & Gaur*. (3rd Ed.), sec. 30; *Coles v. Strick*, 15 Adol. & El. (N. S.) 2; *Mound v. Barker*, 17 Vt. 253; *Dennison v. Gibson*, 24 Mich. 187; *Thorne v. Travelers Ins. Co.*, 80 Pa. St. 15, 21 Am. R. 89, and cases throughout this section.

81. *Thorne v. Travellers Ins. Co.*, *supra*.

that ground to the same extent as the principal.⁸² So, a surety on a note given with intent to hinder, delay or defraud the maker's creditors is not bound;⁸³ and if the issue of certain securities is prohibited by statute, a suretyship thereon is equally prohibited and void.⁸⁴ So a lessor in a lease of premises knowingly let for the sale of liquors contrary to law, cannot enforce a guaranty of the rent,⁸⁵ and sureties for the faithful performance of duty by a servant in a business carried on without complying with certain formalities prescribed by a valid police regulation (in this case an express business), were held not liable for his defaults.⁸⁶

A surety upon a contract void because entered into on Sunday is not bound,⁸⁷ and a contract of suretyship may be void if made and delivered on Sunday, though the principal contract was validly made on a week day.⁸⁸

Clearly, where the principal obligation or that of the surety is given in a transaction amounting, to the knowledge of the creditor, to the composition of a public offense, the surety is not bound;⁸⁹ and though the principal undertaking be perfectly lawful, if the surety signs upon a consideration the whole or any part of which

82. *Huntress v. Patten*, 20 Me. 28; *Conger v. Babbet*, 67 Ia. 13; *Warren v. Crabtree*, 1 Greenl. (Me.) 167, 10 Am. D. 51.

83. *Jackman v. Mitchell*, 13 Ves. 581; *Hook v. White*, 201 Pa. 41; *Wells v. Girling*, 4 Brod. & Bing. 447, 4 Moo. 78. So where the principal contract is in fraud of the public and upon the law. *Dennison v. Gibson*, 24 Mich. 187.

84. *Swift v. Beers*, 3 Denio (N. Y.) 98; *Board of Education v. Thompson*, 33 Oh. St. 321; *Tylee v. Yates*, 3 Barb. (N. Y.) 222.

85. *Mound v. Barker*, 71 Vt. 253, 76 Am. St. R. 767. So as to a guarantee of the price of liquors so sold. *Nourse v. Pape*, 13 Allen (Mass.) 87.

86. *Daniels v. Barney*, 22 Ind. 207.

87. *Com. v. Kendig*, 2 Pa. St. 448; *State v. Young*, 23 Minn. 551; *Parker v. Pitts*, 73 Ind. 597.

88. *Merriam v. Stearns*, 10 Cush. (Mass.) 257. But though negotiations for a guaranty are conducted on Sunday, the written contract is valid if delivered on Monday. *Tyler v. Waddingham*, 58 Conn. 375, 8 L. R. A. 657. A guarantee of a note void because delivered on Sunday is void though such guarantee was delivered on a week day.

89. See *Rourke v. Mealy*, 4 L. R. Ir. 166.

is illegal, he will not be bound where the creditor was a party to the illegality, though he may be bound where the creditor was innocent. Thus where a state treasurer's sureties signed his bond on the condition that he would deposit public moneys in a bank in which they were interested, they were held liable to the state.⁹⁰ A surety for an unlawful agreement or upon an unlawful consideration cannot, if he discharges the debt or obligation secured, claim indemnity,⁹¹ or, it would seem, enforce collaterals given for his protection. The rule would, of course, be otherwise where the surety was ignorant throughout of the illegality of the principal transaction, such illegality not appearing on its face.⁹²

Of course the principal may be bound in some cases notwithstanding the illegality of the contract. Thus, where a bank lends funds upon real estate security, or beyond a certain percentage of its capital, or otherwise contrary to statute, a recovery may usually be had, for such statutes are for the protection of stockholders and creditors. To hold otherwise in such cases would defeat the very purpose of the statute. Only the state or government can complain.⁹³

90. *City of Fergus Falls v. Ill. Surety Co.*, 112 Minn. 463; *Ramsay v. Whitbeck*, 183 Ill. 550. A bond to protect material men was held valid though it was also to secure a contract with a city procured by stifling competition, the contractor only being a party to the illegality. *City Hydraulic Press Brick Co. v. Nat. Sur. Co.*, 149 Fed. 507.

91. *Bryant v. Christie*, 1 Stark 329; *Ramsay v. Whitbeck*, *supra*; *Hanley v. Stapleton's Adm'r*, 24 Mo. 248; *Hill v. Sherwood*, 3 Wis. 343.

92. See *City of Fergus Falls v. Illinois Surety Co.*, 112 Minn. 463.

93. This is the uniform ruling under the National Bank Act. See 2 Morse on Banking, secs. 753 et seq.

CHAPTER VI.

LEGAL REQUIREMENTS AS TO FORM. NECESSITY FOR WRITING—STATUTE OF FRAUDS.

§ 59. **Requirements as to Form in General—Statute of Frauds.** Where the intention of the promisor was sufficiently expressed and the other elements of a binding contract were present, no special requirements of form were necessary at common law to the validity or proof of contracts of guaranty or suretyship. The common law of England on this point remained practically untouched until the enactment of the famous statute called the Statute of Frauds and Perjuries, which received the royal sanction in 1677. This statute did not re-define fraud or perjury or provide new penalties for those wrongs. It simply sought to prevent such frauds as were commonly sought to be upheld by perjury or subornation of perjury and to guard against other risks and uncertainties of parol evidence by providing:

(1) That all freehold estates in corporeal hereditaments that might previously have been created by livery of seizin, and all leases for a longer term than three years should have the force and effect of estates at will, unless created by writing and signed by the grantor.

(2) That the creation and assignment of express trusts in land should be by writing.

(3) That no action should be brought upon certain promises or agreements, unless such promises or agreements, or some note or memorandum thereof was made in writing and subscribed by the party to be charged or his lawfully authorized agent.

These several sorts of contracts or agreements were singled out from the mass of transactions provable by parol at common law, not on the basis merely of their intrinsic importance and the consequent demand for certainty of proof, but because of the peculiar temptation

or opportunity which they afforded to proof by perjured testimony. Roughly they embraced (a) Agreements for the sale of lands or any interest therein; (b) Agreements that by their terms were not to be performed within one year from the making thereof; (c) Special promises by executors or administrators to answer debts or damages out of their private estates; (d) Every special promise to answer for the debt, default or miscarriage of another person.¹ The clause last referred to is the one that bears chiefly on our present subject, for it has been embodied, together with most of the other clauses of the English Act, with more or less changes, in the statutes of our states. This clause of the English statute, isolating it and modernizing its orthography, reads thus:

No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

Doubtless the principal object of this provision was the fairly obvious one of withdrawing from those who trust insolvents or those who become such, the temptation and opportunity to torture or distort, by perjury or otherwise, the loose though honest words of third persons concerning the standing or ability of the debtor or obligor, into positive engagements to answer for his debts or other undertakings, and to thus cast upon them, contrary to their intention and expectations, obligations which are usually peculiarly onerous from the fact that they seldom derive any direct benefit therefrom.²

1. For the original text of the English statute (29 Car. II, c. 3). See Throop Verbal Agreements, p. 21. See also, Browne Stat. Fr. appendix. By another section of the Statute (sec. 17) sales of goods, wares and merchandise for ten pounds sterling or upward must be proved by writing unless part performance has been had.

2. Davis v. Patrick, 141 U. S. 479; Hartley v. Sandford, 66 N. J. L. 627, 55 L. R. A. 206; Nelson v. Boynton, 3 Met. (Mass.) 396, 37 Am. D. 148; Nugent v. Wolfe, 111 Pa. 473.

§ 60. Construction of the Statute—Its General Effect. From the enactment of the Statute of Frauds, down to the present day, courts and lawyers have differed as to its construction. Though the statute is in its general character a remedial one, it is not surprising that it was regarded with disfavor by the courts and that exceptions as to its literal operation were so many and so sweeping as to amount, in many instances, to its practical repeal.³

By the great weight of modern authority, however, the statute is to be at least reasonably if not liberally construed in view of the mischiefs it was intended to remedy. Yet in no jurisdiction perhaps has the rule either of strict or liberal construction been consistently applied, and in no one of the older jurisdictions are the early decisions in entire harmony with the later, and in nearly all of them the course of decision has been largely influenced by the fluctuating interpretations of the English courts. In view of the foregoing, the general effect of the particular clause of the statute under consideration can best be understood by following the original wording of the English law and noting its interpretation in the English courts, and incidentally the American statutory deviations from the English act, and the important rulings under both the English and American statutes.

§ 61. Same—Promise “Direct” or “Original,” or “Collateral”—Terms Distinguished. The terms “direct” and “original” are frequently used in opposition to the term collateral by courts and text-writers, the former to describe promises without, and the latter to describe promises within, the Statute of Frauds, though none of these terms appear in the statute itself.⁴ Commonly a

3. See *Proctor v. Jones*, 2 C. & P. 532, 12 E. C. L. 248.

4. Read *v. Nash*, 1 Wilson 305. The term original is used to mark the obligation of a principal debtor, the term collateral to mark that of a person who undertakes to answer therefor. *Mallory v. Gillett*, 21 N. Y. 412. See also, *Brown v. Weber*, 38 N. Y. 187, 190; *Nelson v. Boynton*, 3 Met. (Mass.) 396, 400, 37 Am. D. 148; *Stone v. Walker*, 13 Gray. (Mass.) 613, 615; *Gibbs v. Blanchard*, 15 Mich. 292, 300.

promise will be in a legal sense original and hence not within the statute,

(1) If no one but the party whose promise it is becomes bound, though the benefit of the consideration is enjoyed, or such consideration moves, directly to another,⁵

(2) If both parties become bound, directly and absolutely jointly or jointly and severally to the creditor or obligee, or⁶

(3) If, though there was originally a debt of another, such debt becomes by novation completely and solely the debt of the promisor, by agreement between him, the original obligor and the creditor.⁷

(4) If, though some other person is bound for the same thing, the main object of such promise is to subserve some business purpose distinctly personal to the promisor, though incidentally he becomes bound for the debt or default of another, or⁸

(5) If the promise is to pay the debt of another out of property or funds belonging to him, so that the promisor may be deemed to act as the agent, trustee or bailiff of the original debtor, or⁹

(6) If the promise to pay the debt of another is made directly to him and not to his creditor.¹⁰

§ 62. "No Action Shall be Brought"—Pleading the Statute. The English statute does not say that oral contracts within its terms shall be void, but simply that *no action shall be brought* whereby to charge the defendant upon any special promise to answer for the debt, etc., of another, unless the agreement or some note or memorandum of it be in writing. This brings us at the outset to the ultimate effect of non-compliance with the

5. Post, sec. 65.

6. Post, sec. 67.

7. Post, sec. 68.

8. Post, secs. 69 et seq.

9. Post, sec. 78.

10. Post, sec. 77.

statutory terms. In other words, is an oral contract of guaranty or suretyship void, voidable, or merely unenforceable? To the non-legal mind any one of these qualities is tantamount to either or both of the others, and so it often practically is in law. Thus if A sues B on an oral contract of guaranty and B properly avails himself of the defense of the statute, B prevails, though if B does not set up the statute by plea or otherwise, A would ordinarily prevail if he proved the bargain.¹¹ It follows that an oral guarantee at least when the wording of the English statute is retained, is neither void nor voidable, but is merely unenforceable, and that a guarantee, though oral, can always be proved by an adequate writing subsequently made.¹²

In a few of our states, however, it is expressly provided that every contract within the purview of the statute shall be *void* unless some note or memorandum of it be made in writing. It has been held, where the statute is so framed, that where a contract within the statute is alleged in the complaint and not admitted by the answer, that the plaintiff must fail if he proves only an

11. As to the proper mode of setting up the statute there is some conflict in the cases. By all authorities it is proper to set it up by plea, or, if the declaration affirmatively shows an oral contract within the statute, it is vulnerable to demurrer. By the weight of authority, however, the statute may be taken advantage of under a general denial by an objection to oral evidence, though this has been denied. But in no case is it necessary for the plaintiff to aver a written contract or memorandum, provided such contract or memorandum was actually made so that it can be proved by primary evidence or by secondary evidence under the ordinary rules. But even where the statute may be taken advantage of under a general denial, if the plea or answer admits the contract, the statute must be specially pleaded. See *Jordan v. Greensboro Furnace Co.*, 126 N. Car. 123, and note thereto in 78 Am. St. R. 648, where the plea of the statute is quite exhaustively considered. Brandt, Sur. & Guar. (3rd Ed.), sec. 102, and cases cited; Stephen on Pleading (Tylers Ed.), 331. See also, Post, sec. 88, as to the conflict of laws touching the defense of the statute.

12. To state the matter in another way, the fourth and seventeenth sections of the statute do no more than create a rule of evidence. See, however, Post, sec. 88.

oral agreement, as under this form of statute he has failed to prove a contract.¹³

§ 63. The Special Promise. The statute applies only to a "special promise" to answer for the debt, default or miscarriage of another. The terms "special promise" as used in the statute is quite uniformly construed to mean an express promise, or one made in fact and in express terms, as distinguished from a promise implied by law.¹⁴ Upon this ground it is held that in those states where the assignment of a chose in action for a valuable consideration implies a guaranty of payment or collection as a common law matter, the statute can not be set up as a defense by the assignor.¹⁵ The term "special promise" is used in some cases as the equivalent of collateral promise, and a key that will often unlock the meaning of "special promise" as used in the Statute of Frauds, has been suggested by the late Dean Ames in the distinction between the actions of debt and special assumpsit. After pointing out that in debt there must have been a quid pro quo, and that one quid pro quo cannot give rise to two distinct debts, he says: "The distinction between Debt and Special Assumpsit, as illustrated in the cases mentioned in the preceding paragraph, is of practical value in determining whether a promise is in certain cases within the Statute of Frauds relating to guaranties. If B gets the enjoyment of the benefit fur-

13. 9 Ency. Pl. & Pr. 709; Langley v. Sanborn, 135 Wis. 178, 184, and cases cited. Jordon v. Greensboro Furnace Co., 126 N. Car. 143, 78 Am. St. R. 644.

14. Throop Verbal Agreements, 166; Browne Stat. Fr. (5th Ed.), sec. 166; Sage v. Wilcox, 6 Conn. 81, 84; Pike v. Brown, 7 Cush. (Mass.) 133, 136; Urquhart v. Brayton, 12 R. I. 169; Furbish v. Goodnow, 98 Mass. 296, and cases cited. See also, Stocking v. Sage, 1 Conn. 519.

15. Allen v. Pryor, 3 A. K. Marsh (Ky.) 305. So of course, as to the implied warranty that the claim assigned is valid in law. See also, Bennett v. Moore, 5 Harr. (Del.) 350; McGee v. Lynch, 3 Hayw. (Tenn.) 106. An express guaranty by an assignor for value would be valid without writing under the main purpose rule. Post, sec. 73. See also, Post, sec. 67, as to joint debtors.

nished by the plaintiff at A's request, but A is the only party liable to the plaintiff, A's promise is not within the statute. If on the other hand, B is liable to the plaintiff for the benefit received, that is, as a debtor, A's promise is clearly a guaranty and within the statute."¹⁶

§ 64. "Debt, Default or Miscarriage." This phrase is peculiarly broad and sweeping, and includes apparently every case in which one person may become liable for another's breach of legal duty toward the promisee, whether such breach is redressable in an action of contract or of tort.¹⁷

§ 65. "Of Another Person." Nothing in the statute has occasioned more difficulty perhaps than the words, "of another person." It is clear, however, that they have no application where there is only one debtor and hence no contract of guaranty or suretyship, though the consideration, whether it be property or service, inures entirely to the benefit of another than the defendant. Thus, if "A" says to "B," "let X have goods and I will pay you," the transaction is not a guaranty or suretyship within the meaning of the statute, but a mere purchase of goods by A, though X receives them or has the benefit of them. Where A's promise is to pay if X does not, the case is clearly within the statute, and the guarantee is unenforceable unless in writing.¹⁸

16. 8 Harv. L. Rev., pp. 164, 165. See also, *Rozer v. Rozer*, 2 Ventris 36; *Lady Shandois v. Sunson*, 1 Cro. Eliz. 880; *Butcher v. Andrews*, Cumberbach 673; *Buckmyr v. Darnall*, 2 Ld. Ray'm 1085. See Post, next section and the notes thereto. If the undertaking is really collateral and hence a guaranty the declaration against the guarantor under the older forms of pleading should of course be in special assumpsit and not in debt. *Mines v. Sculthorpe*, 2 Camp. 215 (1809). Compare *Cope v. Joseph*, 9 Price 160 (1821).

17. *Browne Stat. Fr.* (5th Ed.), sec. 155; *Buckmyr v. Darnall*, 2 Ld. Raym. 1058; *Kirkham v. Marter*, 2 Barn. & Ald. 613; *Turner v. Hubbell*, 2 Day (Conn.) 457, 2 Am. Dec. 115.

18. This distinction is so clearly and universally conceded that an attempt to cite the cases recognizing it or decided on the basis of it would involve a needless sacrifice of space. Many cases are collected in the notes to *Jones v. Cooper*, 1 Cowp. 227 in *Ames Cas. on*

§ 66. Same—Where Principal Incompetent or not Bound. As a general rule there must be a primary legal, as distinguished from a purely moral, obligation on the part of the principal in order that the statute shall apply to the contract of the guarantor or surety. By the weight of authority, however, the contract of one who becomes surety or guarantor for an infant even where the contract of the latter is for non-necessaries, must be in writing, for such contract is voidable and not void, and until

Suretyship, pp. 324, and in 29 Am. & Eng. Encyclo. Law, pp. 906, 907, and in the note to *Sherman v. Alberts*, 126 Am. St. R. 487 et seq. As sustaining the proposition of the text, however, see *Watkins v. Perkins*, 1 Ld. Raym. 224; *Jones v. Cooper*, supra; *Buckmyr v. Darnall*, 1 Salk. 27, 2 Ld. Raym. 1085, 6 Mod. 250; *Hargreaves v. Parsons*, 13 M. & W. 561; *Lakeman v. Mountstephen*, L. R. 7 Q. B. 196; 7 Eng. & Ir. App. 17; *Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. D. 148; *Hartley v. Warner*, 88 Ill. 561; *Boston v. Farr*, 148 Pa. 220; *Radcliff v. Poundstone*, 23 W. Va. 724; *West v. O'Hara*, 55 Wis. 645; *Larson v. Jensen*, 53 Mich. 427; *Champion v. Doty*, 31 Wis. 190. In *Buckmyr v. Darnall*, supra, it was said that if the words of the alleged guarantor were, "Let A have goods and I will see you (the plaintiff) paid," this would be equivalent to the expression, "I will pay," or "I will be your paymaster," and hence an original undertaking. To the same effect, see *Hetfield v. Dow*, 22 N. J. L. 440; *Baldwin v. Hires*, 73 Ga. 739, and the earlier English case of *Watkins v. Perkins*, supra. Compare *Keate v. Temple*, 1 Bos. & P. 158. Where the language of the undertaking is thus equivocal, however, it would seem that whether the undertaking was direct or collateral must depend upon the facts and circumstances of the case, including the construction, if any, that the parties may have placed upon it, at the time or by their subsequent transactions or dealings. As said in *Davis v. Patrick*, 141 U. S. 489. "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise." That the seller charged goods delivered to A directly to him instead of to B is strong evidence for the jury that he deemed B's promise with respect to the price collateral and not direct. *McGowan Commercial Co. v. Midland Coal Co.*, 41 Mont. 211; *Mackey v. Smith*, 21 Ore. 598; *Boykin v. Dohlond*, 27 Ala. 583. But such a charge is not always conclusive. *Lusk v. Throop*, 189 Ill. 127, and cases cited and discussed; *Myer v. Grafflin*, 31 Md. 350, 100 Am. D. 66; *Walker v. Richards*, 41 N. H. 388; *Champion v. Doty*, supra. Similarly as to an entry in the books of the defendant. *Mackey v. Smith*, supra; *Kinlock v. Brown*, 1 Rich. Law (S. Car.) 223; *Cutler v. Hinton*, 6 Rand (Va.) 509.

avoided by plea or otherwise is deemed a binding obligation.¹⁹

But the contracts of a married woman, being utterly void at the common law, it is held that one who undertakes for the performance of her promise or engagement is bound without writing, for there is in point of law no "debt of another," and the undertaking, though in form a guaranty or suretyship, is in fact an original one. To the extent that a feme covert can bind and does bind herself or her estate by contract, however, either in equity or under the enabling statutes known as married women's acts, the undertaking of her surety must, of course, be in writing under the Statute of Frauds.

There must be a legally enforceable duty or liability on the part of a principal, existing when the guaranty was made, or contemplated and afterward arising, in order that the statute shall apply. Where, therefore, the promise was to pay if goods or services are not paid for by one who, though competent, was not bound for them at the time of the guarantor's contract and did not become so afterward, the promise was held good without writing.²⁰

19. *Dexter v. Blanchard*, 11 Mass. 365; *Brown v. Farmers' Bank*, 88 Tex. 265, 33 L. R. A. 359; *International Textbook Co. v. McKone*, 133 Wis. 200. Compare *King v. Summitt*, 73 Ind. 312, 38 Am. R. 145, containing a dictum to the contrary. See also, *Chapin v. Lapham*, 20 Pick. (Mass.) 471.

20. *Mease v. Wagner*, 1 McCord (S. Car.) 395. A undertook in favor of B to procure a written guaranty from C, which C refused to give and was under no obligation to give. Held, that A was liable without writing as upon an original undertaking. *Bushnell v. Beavan*, 1 Bing. (N. C.) 103. See also, *Resseter v. Waterman*, 151 Ill. 159; *Read v. Nash*, 1 Wils. 305; *Elkins v. Hart*, Fitzg. 202; *Jarmain v. Algar*, 2 C. & P. 249; *Marion v. Faxon*, 20 Conn. 486; *Ingraham v. Strong*, 41 Ill. App. 46; *Jepherson v. Hunt*, 2 Allen (Mass.) 417; *Douglass v. Jones*, 3 E. D. Sm. (N.Y.) 551; *Sampson v. Swift*, 11 Vt. 315; *Bellows v. Sowles*, 57 Vt. 165. See *Carville v. Crane*, 5 Hill 483, 485, criticising *Bushnell v. Beavan*, *supra*, on the ground that the defendant's undertaking was in effect to answer for the debt of the one for whom the defendant undertook to procure a guarantor.

If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time

§ 67. **Same—Joint Promisors.** Though joint debtors, as we have seen, are in a sense co-sureties,²¹ yet if two or more persons undertake as joint debtors or jointly and severally for money borrowed, goods delivered or services rendered, whether before or after their promise was made, such promise need not be in writing, though the goods or money are delivered to, or the services performed for, only one of them; nor does it render a writing necessary in such cases that as between such joint promisors, one of them has agreed to bear ultimately the whole burden of the debt. As remarked in *Gibbs v. Blanchard*,²² quoting *Whitfield v. Dow*,²³ that “to settle the rights of promisors, inter sese, to ascertain as between them who is to pay the debt ultimately is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt is, as to the promisee, the principal debtor. That does not concern him. This view, it seems to me, rests upon sound reasons,—reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be

and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default, or misdoings of another person. There was no obligation of the corporation or of any other person for whom the defendant promised to answer. *Trenholm v. Kloepper*, — Neb. — (1911), 129 N. W. 436. See also, *Manary v. Runyon*, 43 Oreg. 495; *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. R. 361, and cases cited and reviewed in 126 Am. St. R. 489.

21. Ante, sec. 13.

22. 15 Mich. 292.

23. 3 Dutch. (N. J.) 440.

shown to defeat the promise, would operate as a fraud upon the vendor.”²⁴

§ 68. Same—Debt or Obligation Novated or Otherwise Discharged. Novation in this connection usually signifies the substitution, by the valid agreement of all parties interested, of a new debtor or obligor in place of another who was originally bound, whereby the debt or obligation of the latter is shifted to the new promisor and thus discharged. Where the novation is perfect and complete it is obvious that there is no longer any “debt of another,” the undertaking of the new debtor or obligor to pay or perform is original and not collateral, and no writing is necessary under the statute.²⁵

The novation must be complete, however, and if the original debtor remains bound the statute applies,²⁶ unless there is some new consideration of benefit to the promisor moving to him from the creditor, sufficient to bring the case within the main purpose rule, later discussed.²⁷

24. In support of these views see *Ex parte Lane*, 1 De Gex. 300; *Wainright v. Straw*, 15 Vt. 215, 40 Am. D. 675; *Stone v. Walker*, 13 Gray (Mass.) 613; *Casey v. Barbason*, 10 Abb. Pr. Rep. 368; *Spann v. Batzell*, 1 Fla. 301; *Peele v. Powell*, 156 N. Car. 553; *Horne v. Bank*, 108 N. Car. 119; *Nelson v. Richardson*, 4 Sneed (Tenn.) 307; *Paul v. Stackhouse*, 38 Pa. St. 302. See also, *Cooper v. Gibbons*, 3 Camp. 363; *Throop on Verbal Agreements*, pp. 282, 289.

25. *Anstey v. Marden*, 4 B. & P. 124; *Throop Verb. Agreements*, 318, 322, 370, 374; *Bish. on Contr.* (New Ed.), sec. 1261 and cases cited. *Smith Bros. & Co. v. Miller*, 152 Ala. 485; *Bird v. Gammon*, 3 Bing. (N. Cas.) 88, 32 E. C. L. 883; *Anderson v. Davis*, 9 Vt. 136, 31 Am. D. 613; *Gray v. Herman*, 75 Wis. 453, 6 L. R. A. 691; *Booth v. Eigme*, 60 N. Y. 238, 19 Am. R. 171; *Mereden Britanna Co. v. Zingsen*, 48 N. Y. 247, 8 Am. R. 549; *Eden v. Chaffee*, 160 Mass. 225; *Packer v. Benton*, 35 Conn. 343, 95 Am. D. 246, and note; *American, etc. Co. v. Schultz*, 88 N. Y. Supp. 496, 43 Misc. 437. In *Anstey v. Marden*, *supra*, *Mansfield, C. J.*, pointedly observed that he could not see “how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain.”

26. *Anderson v. Davis*, *supra*; *Furbish v. Goodnow*, 98 Mass. 296; *Taylor v. Weisel*, 59 Wis. 101; *Gray v. Herman*, *supra*; *Gumels v. Stewart*, 3 Brev. (S. Car.) 52.

27. *Post*, secs. 69 et seq.

There may also be novation where the original debtor remains bound for the same debt or performance, there being a mere substitution by mutual agreement of a new creditor in place of the old. The promise to pay the new creditor is clearly not within the statute.²⁸

So, though there is no novation, if the principal debtor is discharged in consideration of the promise of another this latter promise need not be in writing. Thus, where a son was arrested under *ca. sa.* and a father, to obtain his release, undertook to return him into the custody of the sheriff on or before a certain day or to pay the damages and costs for which the son was taken in execution, it was held that the case was not within the statute, for the legal result of the enlargement of the son was the satisfaction of his debt to the plaintiff. The father's undertaking was therefore original and not collateral to answer for the debt of another.²⁹

§ 69. Where Original Debtor Remains Bound—New Consideration Moving to Guarantor or Surety—"Main Purpose Rule." But though there is no novation so that the original debtor remains bound the statute may not apply. Indeed it has been broadly held or asserted by some early authorities and a few modern ones, that where the promise of the guarantor is based upon a new and valuable consideration moving from the creditor, independent of that which supports the undertaking of the principal, that such promise is not affected by the statute.³⁰

28. *Lacy v. McNelle*, 4 D. & Ry. 7; *Aultman v. Fletcher*, 110 Ala. 452; *Gallagher v. Nichols*, 60 N. Y. 438; *Van Wagner v. Territt*, 27 Barb. (N. Y.) 181.

29. See *Goodman v. Chase*, 1 Barn. & Ald. 297; *Butcher v. Stewart*, 11 M. & W. 857; *Mercein v. Andrus*, 10 Wend. (N. Y.) 461, explained in *Mallory v. Gillett*, 21 N. Y. 424; *Cooper v. Chambers*, 4 Dev. 261. See also, *Griffin v. Derby*, 5 Me. 476.

30. See *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. D. 317, and dicta in *Ellwood v. Monk*, 5 Wend. (N. Y.) 225, and *Farley v. Cleveland*, 4 Cow. (N. Y.) 639. See 29 Encyclo. L. (2nd Ed.), p. 928, note 1; *Browne Stat. Fr.* (5th Ed.), secs. 169, 170, 171, 212; *White v. Rintoul*, 108 N. Y. 222, discussing earlier cases in New York.

This view, however, is distinctly contrary to the overwhelming weight of authority, for its adoption would place all compensated suretyships outside the statute, a result obviously not intended by its framers and calculated to promote the very mischief it was intended to remedy.³¹ By the weight of modern authority, therefore, the statute applies to all express contracts of guaranty and suretyship in spite of the fact that there is a new and distinct consideration moving from the creditor to the surety, unless the main or primary object of the surety is not to answer for the debt or default of another person but to subserve some purpose distinctly his own.³² In the latter case no writing is necessary. This is sometimes called "*the main purpose rule*," and has been laid down by the Supreme Court of the United States as follows: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may

31. See the remarks of Hibbard, J., in *Lang v. Henry*, 54 N. H. 57, 61. See also, *Fullam v. Adams*, 37 Vt. 391; *Maule v. Bucknell*, 50 Pa. 39; *Kelsey v. Hibbs*, 13 Oh. St. 340; *Dillaby v. Wilson*, 60 Conn. 71, 25 Am. St. R. 299. As to compensated corporate sureties, however, see the next section.

32. *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Nelson v. Boynton*, 3 Met. (Mass.) 396, 403, 37 Am. D. 148; *Ames v. Foster*, 106 Mass. 400, 403, 8 Am. R. 343; *Cowenhoven v. Howell*, 36 N. J. L. 323, 325; *Durant v. Allen*, 48 Vt. 58; *Hooker v. Russell*, 67 Wis. 257; *Commercial Nat. Bank v. Smith*, 107 Wis. 574; *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. R. 181, and note; *Warner v. Willoughby*, 60 Conn. 468, 471, 25 Am. St. R. 343; *Calkins v. Chandler*, 36 Mich. 325; *Ruppe v. Peterson*, 67 Mich. 437; *Gump v. Halberstadt*, 15 Or. 356; *Mallory v. Gillett*, 21 N. Y. 412; *White v. Rintoul*, 108 N. Y. 222; *Manle v. Bucknell*, 50 Pa. St. 39; *Riegelman v. Focht*, 141 Pa. 380, 23 Am. St. R. 293; *Howell v. Harvey*, 65 W. Va. 310, 22 L. R. A. 1077, 1079, note; *Schaafs v. Wentz*, 100 Ia. 708; *Frohart Bros. v. Duff*, 155 Ia. —; *Gilles v. Mahony*, 79 Minn. 309; *Templeton v. Bascom*, 33 Vt. 132.

incidentally have the effect of extinguishing that liability." ³³

§ 70. **Same—Oral Contract of Surety Company.** Where a contract is strictly one of corporate fidelity guaranty insurance, it would seem on principle that the Statute of Frauds is inapplicable to its oral undertaking, though such undertaking is within the letter of the law. Not only would such a contract be in the nature of oral insurance, and for that reason outside the purview of the statute, but the fact that the earning of premiums by making such contracts is the sole, or at least the principal, business purpose of such companies as chartered,

33. *Emerson v. Slater*, 22 How. (U. S.) 28, 43, quoted with approval in *Davis v. Patrick*, 141 U. S. 479. To this may be added the observation of Mr. Browne, in his work on the Statute of Frauds, section 165: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. (Comp. Browne, Stat. Fr. (5th Ed.), sec. 214. See *Davis v. Patrick*, *supra*, and cases in the preceding note and throughout the next two sections.

The following cases also support the general proposition that, if the leading object of the promisor is not to become surety or guarantor of another, but to promote or subserve some interest of his own, his oral promise to pay another's debt is not within the statute of frauds, even though the original debtor is not released: *Tindall v. Touchberry*, 3 Strob. (S. C.) 177, 49 Am. Dec. 637; *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. R. 181, and note; *Joseph v. Smith*, 39 Neb. 259, 42 Am. St. R. 571; *Marrow v. White*, 151 N. C. 96; *Lorick v. Caldwell*, 85 S. Car. 94; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229, and cases cited; *Oldenberg v. Dorsey*, 102 Md. 172, 5 Ann. Cas. 841; *Borchesenius v. Canutson*, 100 Ill. 82, 92; *Parker v. Benton*, 95 Am. D. 258, and note.

* If the evidence is in conflict as to whether the promise is independent or collateral, the question, it seems, is for the jury. *Davis v. Patrick*, *supra*; *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 Mont. 211; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893, and note; *Frohart Bros. v. Duff*, 155 Ia. —, and cases cited. See also the comments on *Williams v. Leper*, Post, sec. 74, and cases cited in note 46.

would seem clearly to bring the transaction within the main purpose rule discussed in the preceding section.³⁴

§ 71. Same—Indirect, Remote or Incidental Benefit to Guarantor or Surety. Ordinarily the fact that the surety may derive some indirect, remote or incidental benefit from the transaction is not enough to bring the case within the main purpose rule, and thus to render a writing unnecessary under the Statute of Frauds. Upon this principle it is generally held that a promise by a stockholder to answer for a debt of the corporation for which he is not otherwise personally responsible must be in writing under the statute.³⁵

Neither would the fact that the object or motive of the guarantor was to gratify some personal feeling of pride, gratitude or moral obligation be sufficient to bring the case within the main purpose rule.³⁶

§ 72. Same—Must the Consideration Move From Promisee? In order that a promise to pay a debt for which another becomes or continues bound shall be valid without writing within the main purpose rule, must the consideration move from the promisee, or is it sufficient that it moves from the original or principal debtor? In Massachusetts, at least, it seems that unless the consid-

34. Richards on Ins. (3rd Ed.), sec. 80; Frost Guar. Ins. (2nd Ed.), sec. 6. See *Fidelity & Casualty Co. v. Ballard*, 20 Ky. L. Rep. 1169, 105 Ky. 253, on the validity of oral insurance generally. There appears to be little direct adjudication on this subject, though in *Com v. Hinson*, 143 Ky. 428, Anno. Cas. 1912 D. 241, the statute was held to apply.

35. *Harburg India Rubber Comb. Co. v. Martin* (1902), 1 K. B. 778; *Hanson v. Donkersley*, 37 Mich. 134; *Home Nat. Bank v. Waterman*, 134 Ill. 161, 167; *Browne Stat. Fr.* (5th Ed.), sec. 164 and cases cited. Where a stockholder in a corporation guaranteed to B. the purchase price of stock sold by B to C it was held, that any incidental benefit that might accrue to A through having B out of the company and C in, was not enough to bring the guaranty within the main purpose rule. *Commercial Nat. Bank v. Smith*, 107 Wis. 574. See also, *Carleton v. Floyd*, 192 Mass. 204; *Ames v. Foster*, 106 Mass. 401.

36. *White v. Rintoul*, 108 N. Y. 222. See also, *Clapp v. Webb*, 52 Wis. 638; *Williamson v. Hill*, 3 Mack. (D. C.) 100.

eration moves from the *creditor* to the new promisor or guarantor the statute applies. Thus in *Furbish v. Goodenow*,³⁷ the defendants orally promised to pay the plaintiffs the debt due them from a third party, in consideration solely of a conveyance of land by such third person to the defendant. There being no evidence that the original debt was extinguished or the original debtor released, or that the property conveyed was received in trust for the payment of the debt, it was held that the Statute of Frauds was a defense.³⁸ The weight of authority, however, appears to be the other way,³⁹ and in the case of guarantee and fidelity insurance, the fact that the premium is paid by the "risk" rather than by the beneficiary or obligee would not alone, it would seem, render the bond inoperative, or avoid an oral contract of insurance, for a consideration flowing from the obligee could doubtless be found in practically all cases if necessary, distinct from the premium strictly so called.

§ 73. Applications of the Main Purpose Rule—Oral Guaranty in Sale or Transfer of Securities. The most common application of the "main purpose rule" is where the holder of a note or other security assigns it for value, orally guaranteeing its payment or collection. In such cases his main or primary purpose is not to answer for the debt of another, though he does so incidentally,

37. 98 Mass. 297.

38. In apparent accord with this case are *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Brightmann v. Hicks*, 108 Mass. 246; *Clapp v. Lawton*, 31 Conn. 95; *Brown v. Hazen*, 11 Mich. 219; *Halsted v. Francis*, 31 Mich. 113; *Shoemaker v. King*, 40 Pa. 107; *Maule v. Bucknell*, 50 Pa. 53; *Fullam v. Adams*, 37 Vt. 391, 397. Some of these cases are decided, or might have been, under the rule that the consideration for an *assumpsit* must move from the plaintiff at common law. See *Maule v. Bucknell*, *supra*. Compare with the foregoing *Townsend v. Long*, 77 Pa. 143, 18 Am. R. 438; *Taylor v. Preston*, 79 Pa. 436; *Fehlinger v. Wood*, 134 Pa. 517.

39. *Morrison Co. v. Hogue*, 49 Ia. 574; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. D. 387; *Hoyle v. Bailey*, 58 Wis. 434; *Lang v. Henry*, 54 N. H. 54. Clearly the statute does not apply where the consideration received constitutes a fund out of which the guarantor engages to pay. *Post*, sec. 78.

but to induce the assignee to take the security as a purchaser, or in extinction of, or as security for, the guarantor's own debt, and the statute does not apply. To this proposition there is practically no dissent.⁴⁰

There is authority, however, for the rule that where the note of a third party is procured to be given by the maker directly to the creditor in absolute extinction of a debt, that a guaranty of it by the original debtor must be in writing on the ground that, there being no longer any debt of the guarantor, his promise is purely for the debt of another (the maker of the note), rather than for the payment of his own debt in a particular way.⁴¹

The doctrine of this case, if sound, is doubtless confined strictly to cases where the note of a third person is taken directly by the creditor in extinction of the guarantor's debt, and has not been extended to cases where the guarantor is the owner and holder of the note at the time of the transfer with oral guaranty for a consideration moving to himself.⁴²

§ 74. Same—Guaranty in Consideration of Release or Transfer of Lien or Incumbrance on Guarantor's Property. An almost equally common application of the main purpose rule is where the promisee holds or is en-

40. *Brown v. Curtiss*, 2 N. Y. 225; *Cardell v. McNiell*, 21 N. Y. 336, 340; *Milks v. Rich*, 80 N. Y. 269, 271, 36 Am. R. 615, and cases cited; *Malone v. Keener*, 44 Pa. 107; *Taylor v. Preston*, 79 Pa. 436; *Townsend v. Long*, 77 Pa. 143, 18 Am. R. 438; *Huntington v. Wellington*, 12 Mich. 10; *Barker v. Scudder*, 56 Mo. 272; *Darst v. Bates*, 95 Ill., p. 512; *King v. Summitt*, 73 Ind. 312, 38 Am. R. 145; *Voris v. Building & Loan Assn.*, 20 Ind. App. 630; *Dyer v. Gibson*, 16 Wis. 557; *Eagle Mowing & R. Mach. Co. v. Shattuck*, 53 Wis. 455, 40 Am. Rep. 780; *Little v. Edwards*, 69 Md. 499; *Smith v. Corege*, 53 Ark. 295; *Crane v. Wheeler*, 48 Minn. 207; *Kiernan v. Gratz*, 42 Or. 474; *Wright v. Smith*, 81 Va. 777.

41. *Dow v. Swett*, 134 Mass. reaffirmed in *Id.* 140, 45 Am. R. 310. See comments on this case in *Browne Stat. Fr.* (5th Ed.), secs. 165. 165a.

42. See *Sheldon v. Butler*, 24 Minn. 513; *Crane v. Wheeler*, 48 Minn. 207; *Eagle Mowing & R. Machine Co. v. Shattuck*, 53 Wis. 455. 40 Am. Rep. 780; *Hassinger v. Newman*, 83 Ind. 124, 43 Am. R. 64, where the distinction taken in *Dow v. Swett* is not observed.

titled to claim some lien or incumbrance upon property of the guarantor, or in which the guarantor has an interest, and relinquishes it or his right to claim or enforce it upon the latter's promise to answer for the debt or engagement of a third person which such lien or incumbrance secures or would otherwise secure. Such promise is not within the statute.⁴³

But the mere fact that the creditor relinquishes some lien or security upon the property of the principal in consideration of the guaranty does not take the case out of the statute by rendering the guarantor's contract original rather than collateral and render a writing unnecessary, so long as the principal remains bound for the debt, and the guarantor himself has no lien or other beneficial interest of a proprietary nature in the property which he desires to protect,⁴⁴ unless indeed, the

43. *Castling v. Aubert*, 2 East. 325; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374, 392; *Templeton v. Bascom*, 33 Vt. 132; *Jepherson v. Hunt*, 2 Allen (Mass.) 417, 423; *Wills v. Brown*, 118 Mass. 137, 138; *Fears v. Story*, 131 Mass. 47; *Arnold v. Stedman*, 45 Pa. 186; *Smith v. Bank*, 110 Pa. 508; *Scott v. White*, 71 Ill. 287; *Bailey v. Marshall*, 174 Pa. 602; *Borchsenius v. Canutson*, 100 Ill. 82; *Power v. Rankin*, 114 Ill. 52; *Crawford v. King*, 54 Ind. 6, 10; *Bott v. Barr*, 95 Ind. 243; *Prime v. Koehler*, 77 N. Y. 91, 94; *Blackford v. Gaslight Co.*, 43 N. J. L. 438; *Young v. French*, 35 Wis. 111; *Weisel v. Spence*, 59 Wis. 301, and cases cited; *Hewitt v. Currier*, 63 Wis. 386, 395; *Helt v. Smith*, 74 Iowa 667; *Townsend v. White*, 102 Iowa 477; *Provenchee v. Piper*, 68 N. H. 31; *Swayne v. Hill*, 59 Neb. 652, 655; *Howell v. Harvey*, 65 W. Va. 310, 22 L. R. A. (N. S.) 1077, and note. Compare *Warner v. Willoughby*, 60 Conn. 468, 25 Am. St. R. 243; *Frohart Bros. v. Duff*, 155 Ia. — (1912), 135 N. W. 609. But where the object of the guarantor was to induce the creditor to supply the principal with additional material to carry on building operations for the guarantor, it was held that the statute applied. *Miles v. Driscoll*, 201 Mass. 218; *Griffin v. Cunningham*, 183 Mass. 505. See *Wilhelm v. Voss*, 116 Mich. 106. Contra, *Howell v. Harvey*, *supra*, and cases cited and discussed in the opinion and in the note. See *Roussel v. Mathews*, 70 N. Y. Supp. 886, 62 App. D. 1, aff. 171 N. Y. 634 on memorandum.

44. *Harburg, etc. Co. v. Martin*, 1 K. B. 778 (1902); *Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. D. 148; *Mallory v. Gilett*, 21 N. Y. 412. See the note to *Forth v. Staunton*, 1 Saund. (5th Ed.) 211e. Similarly as to mere forbearance to levy execution or attachment upon the property of the principal in which the guarantor has no special legal interest. *Ames v. Foster*, 106 Mass. 400; *Kurtz v.*

transaction amounts to a purchase of such lien or incumbrance by the guarantor.⁴⁵ In this connection it may be well to notice the early English case of *Williams v. Leper* (3 Burr., 1886), which has sometimes been misinterpreted and misapplied. The facts are as follows: One Taylor owed the plaintiff 45£ for rent. He conveyed all his effects for the benefit of his creditors, who employed Leper, the defendant, to sell them; and he advertised them for sale accordingly. The plaintiff then came to distrain, and the defendant promised to pay the rent if he would not distrain; and he desisted accordingly. Lord Mansfield said the defendant was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. Justice Wilmot said "the defendant became the bailiff of the landlord, and, when he had sold the goods, the money was the landlord's in his own bailiff's hands. Therefore, he said, an action would have lain against the defendant for money had and received to the plaintiff's use. Justice Yates said, it was an original consideration to the defendant. Justice Aston thought the goods were a fund between both, and on that foot he concurred. The view commonly taken of this case, and no doubt the correct one, is that the promise of the defendant was not within the statute for the reason that his object in making it was to secure an object personal and beneficial to himself, or in other words, the right to go on and sell the goods without interference from the plaintiff, retaining a fund in his hands otherwise applicable to the debt of another which he engages to pay.⁴⁶

Stewart, 54 Ind. 178; Compare *Adkinson v. Barfield*, 1 McCord L. (S. Car.) 575; *Whitehurst v. Hyman*, 90 N. Car. 487.

45. *Castling v. Aubert*, 2 East. 325; *Alger v. Scoville*, 1 Gray (Mass.) 391, 396; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Ames v. Foster*, *supra*, and cases cited.

46. See *Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. D. 148; *Kliner v. DeYoung*, 54 Pa. 118; *Hale v. Boardman*, 77 Barb. (N. Y.) 82; *Blackford v. Planefield Co.*, 43 N. J. Law 438. See also as in apparent general accord with *Williams v. Leper*; *Castling v. Aubert*, 2 East, 325; *Edwards v. Kelly*, 6 M. & Sel. 204; *Bampton v. Paulin*, 4

§ 75. Are Contracts of Indemnity Within the Statute?

It is established in England after some fluctuation that a promise to indemnify or save harmless one who is himself answerable or to become answerable for the debt or default of another is not within the Statute of Frauds, and hence need not be in writing.⁴⁷ This view of the law has been adopted by most of the courts of this country.⁴⁸

Bnig. 264, 12 Mo. 497, s. c.; Walker v. Taylor, 6 C. & P. 752; Blount v. Hawkins, 19 Ala. 100; Spann v. Baltzell, 1 Fla. 338; Scott v. White, 71 Ill. 287; Bunting v. Darbyshire, 75 Ill. 408; Borchsenius v. Canutson, 100 Ill. 82; Luerk v. Malone, 34 Ind. 444; Conradt v. Sullivan, 45 Ind. 180, 15 Am. R. 261; Crawford v. King, 54 Ind. 6; Mitchell v. Griffin, 58 Ind. 559; Parker v. Dillingham, 129 Ind. 542; Helt v. Smith, 74 Iowa 667; Fish v. Thomas, 5 Gray (Mass.) 45; Burr v. Wilcox, 13 Allen (Mass.) 269; Hodgkins v. Heaney, 15 Minn. 185; Abbott v. Nash, 35 Minn. 451; Kansas Co. v. Smith, 36 Mo. App. 608; Winn v. Hillyer, 43 Mo. App. 139; Rogers v. Emkie, 24 Neb. 653; Joseph v. Smith, 39 Neb. 259, 42 Am. St. R. 571; First Bank v. Dohm, 52 N. J. L. 363; Ludwick v. Watson, 3 Oreg. 256; Arnold v. Stedman, 45 Pa. 186; Landis v. Royer, 59 Pa. 95; Smith v. Exchange Bank, 110 Pa. 508; Bailey v. Marshall, 174 Pa. 603; Templeton v. Bascóm, 33 Vt. 132; Fullam v. Adams, 37 Vt. 391; Weisel v. Spence, 59 Wis. 301; Green v. Hadfield, 89 Wis. 138. *Contra*, Warner v. Willoughby, 60 Conn. 471. Many of the American cases above make no reference to Williams v. Leper, being decided mainly with reference to the main purpose rule.

47. The rule was first laid down in Thomas v. Cook, 1 B. & C. 728 (1828), which was afterward overruled in Green v. Cresswell, 10 Ad. & El. 453 (1839), which is deemed to have been in turn overruled in Cripps v. Hartnoll, 32 L. J. (N. S.) Q. B. 381, 4 B. & S. 414, 13 C. P. (N. S.) 344. See also as supporting the rule of the text Wildes v. Dudlow, L. R. 19 Eq. 198; Guild v. Conrad, 2 Q. B. 885 (1894); Reader v. Kingham, 13 C. B. (N. S.) 344; Batson v. King, 4 H. & N. 739; In re Bolton, 8 Times L. R. 668; Hoyle v. Hoyle (1893), 1 Ch. 84; Ry. Wagon Co. v. Maclure L. R. 19 Ch. 478.

48. Smith v. Delaney, 64 Conn. 264, 42 Am. St. R. 181, 186 and note. Reed v. Holcomb, 31 Conn. 360; Godden v. Pierson, 42 Ala. 370; Chapin v. Merrill, 4 Wend. (N. Y.) 657; Tighe v. Morrison, 116 N. Y. 263, 5 L. R. A. 617 and note. Harrison v. Sawtel, 10 Johns. (N. Y.) 242, 6 Am. D. 337; Jones v. Bacon, 72 Hun 506, 145 N. Y. 446; Chapin v. Lapham, 20 Pick. (Mass.) 467; Aldrich v. Ames, 9 Gray, 76; Holmes v. Knights, 10 N. H. 175; Demeritt v. Bickford, 58 N. H. 523; Mills v. Brown, 11 Iowa 314; Merchant v. O'Rourke, 111 Iowa 351, 355-6; Shook v. Vanmater, 22 Wis. 532; Vogel v. Melms, 31 Wis. 306, 11 Am. R. 608; Anderson v. Spence, 72 Ind. 315, 37 Am. R. 162; Keesling v. Frazier, 119 Ind. 185; Minick v. Huff, 41 Neb. 516; Ressetter v. Waterman, 151 Ill. 169; Fidelity, etc. Co. v. Lawler, 64 Minn. 144; Esch v. White, 76 Minn. 220; Boyer v. Soules, 105 Mich. 31; Cutter v. Emery, 37 N. H.

A contract between co-sureties fixing the proportion in which each, as among themselves, shall be liable on account of the common burden is likewise an original undertaking, and not within the statute in view both of the foregoing and independent principles, even though it amounts to a promise by one of them to completely indemnify the other or others.⁴⁹

§ 76. Same—Promise of Del Credere Agent. An agent who promises his principal to be responsible for the price of goods sold by him in consideration of his employment and commissions is called a del credere agent. His promise, in such cases, is generally held not to be within the Statute of Frauds, as the guaranty, if it can properly be termed one, is a mere incident to his contract with and employment by the principal, and is in the nature of a direct promise by him to indemnify the principal against his (the agent's) bad judgment or misfortune in selling to those who do not or cannot pay. The main purpose of the promisor in such cases is to obtain the employment with its advantages and rewards, and

567; *Rose v. Wollenberg*, 31 Oreg. 269; *Ross v. Espy*, 66 Pa. St. 481; *Beamon v. Russell*, 20 Vt. 205; *Taylor v. Savage*, 12 Mass. 102. *Contra*, *Easter v. White*, 12 Ohio St. 219; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. R. 393; *Bissig v. Britton*, 59 Mo. 204, 21 Am. R. 379; *Hurt v. Ford*, 142 Mo. 283, 41 L. R. A. 823; *Gansey v. Orr*, 173 Mo. 532; *May v. Williams*, 61 Miss. 125, 48 Am. R. 80; *Nugent v. Wolfe*, 111 Pa. 471. 56 Am. R. 291; *Wolverton v. Davis*, 85 Va. 64, 17 Am. St. R. 56; *Hartley v. Sanford*, 66 N. J. L. 627, 55 L. R. A. 206, distinguishing earlier cases in that state.

49. *Blake v. Cole*, 22 Pick. (Mass.) 97; *Taylor v. Savage*, 12 Mass. 102; *Weeks v. Parsons*, 176 Mass. 570; *Phillips v. Preston*, 5 How. (U. S.) 278; *Apgar v. Hiler*, 24 N. J. L. 812, distinguished in *Hartley v. Sanford*, *supra*; *Barry v. Ransom*, 12 N. Y. 462; *Sanders v. Gillespie*, 59 N. Y. 250; *Horn v. Bray*, 51 Ind. 555, 19 Am. R. 742; *Houck v. Graham*, 123 Ind. 277; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. R. 393; *Chapeze v. Young*, 87 Ky. 476; *Boyer v. Soules*, 105 Mich. 31, 35 and authorities cited. *Rose v. Wollenberg*, 31 Or. 269, 65 Am. St. R. 826, 39 L. R. A. 378; *Faulkner v. Thomas*, 48 W. Va. 148. *Contra*, *Missig v. Britton*, 59 Mo. 204, 21 Am. R. 379; *Wolverton v. Davis*, 85 Va. 64, 17 Am. St. R. 56.

his agreement to answer for the debts of his customers is purely incidental.⁵⁰

§ 77. Promise Directly to Debtor to Pay His Debt. A promise to pay the debt of another, made directly to the debtor and not to the creditor, is not within the statute, and need not be evidenced by writing. Such a promise is held not to be within the intent or mischief of the statute. This is substantially a promise to the debtor to pay him a sum of money to the same amount,⁵¹ and is enforceable, at least by the debtor, provided it is based upon a valuable consideration moving from him to the promisor.⁵² Whether the creditor may himself enforce such a promise depends, of course, upon whether, in the particular jurisdiction, a third person for whose benefit a contract is made may sue upon it in spite of the fact that he is a stranger to the consideration, a ques-

50. *Couturier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Sutton v. Grey*, 69 L. T. Rep. 354, affirmed in 1 Q. B. 285; *Wolff v. Koppel*, 5 Hill (N. Y.) 458, 2 Denio 368, 43 Am. D. 751; *Sherwood v. Stone*, 14 N. Y. 267; *Bradley v. Richardson*, 23 Vt. 720, 731; *Osborne v. Baker*, 34 Minn. 307, 57 Am. R. 55; *Bulow v. Orgo*, 57 N. J. Eq. 428; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. D. 282, and authorities cited. In this last case it was held that *indebitatus assumpsit* would lie for the overdue price of goods sold by a *del credere* agent.

51. *Browne Stat. Fr.* (5th Ed.) sec. 188; *Eastwood v. Kenyon*, 11 A. & E. 438; *Hargreaves v. Parsons*, 13 M. & W. 569; *Pratt v. Humphrey*, 22 Conn. 317; *Barker v. Bucklin*, 2 Denio (N. Y.) 263; *Oliphant v. Patterson*, 56 Pa. 368; *Meyer v. Hartman*, 72 Ill. 442; *Crim v. Fitch*, 53 Ind. 214; *Carraher v. Allen*, 112 Ia. 168; *Martin v. Davis*, 80 Wis. 376; *Merserreau v. Lewis*, 25 Wend. (N. Y.) 243; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Soule v. Albee*, 31 Vt. 142; *North v. Robinson*, 1 Duvall (Ky.) 71; *Morin v. Martz*, 13 Minn. 191; *Ware v. Allen*, 64 Miss. 545, 60 Am. R. 67; *Goltz v. Foss*, 14 Minn. 265, 100 Am. D. 218; *Pratt v. Humphrey*, 22 Conn. 317. See also, *Patton v. Mills*, 21 Kan. 163; *Botkin v. Middlesboro, etc. Co.*, 23 Ky. L. 1964; *Smith v. Caldwell*, 6 Idaho 436; *Heddin v. Schneblin*, 126 Mo. App. 478, and cases cited, *infra*, note 54. That the promise by an incoming partner to his associates in consideration of his admission into a firm or the transfer to him of an interest therein, to pay firm debts is not within the statute, is abundantly well settled. *Dickson v. Conde*, 148 Ind. 279. See also, *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. D. 387.

52. *Barker v. Buckling*, *supra*.

tion that may arise whether there is a writing or not.⁵³ Where the third party is permitted to sue, however, it is no defense to his action that the contract was not in writing.⁵⁴

§ 78. Promise to Pay out of Funds or Property of Principal Debtor. If one has funds or goods in his hands belonging to another which he is under a duty,⁵⁵ or is authorized to apply⁵⁶ to the discharge of such other's

53. Upon the general question of the right of a stranger to the consideration to sue upon a contract, made for his benefit, see *Browne Stat. Fr. (5th Ed.)* secs. 166 a et seq., and authorities cited. *Mason v. Hall*, 30 Ala. 599, and authorities cited. *Tweeddale v. Tweeddale*, 116 Wis. 517, and cases cited.

54. *Barker v. Bucklin*, supra; *Mason v. Hall*, 30 Ala. 599; *Coleman v. Hatcher*, 77 Ala. 217; *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. D. 59; *Mulvaney v. Gross*, 1 Colo. App. 112; *American Co. v. Wolfe*, 30 Fla. 360; *Howell v. Field*, 70 Ga. 592; *Wilson v. Bevans*, 58 Ill. 232; *Neagle v. Kelly*, 146 Ill. 460; *Scudder v. Carter*, 43 Ill. App. 252; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. R. 495; *Helms v. Kearns*, 40 Ind. 124; *Poole v. Hintrager*, 60 Iowa, 180; *Plano Co. v. Burrows*, 40 Kas. 361; *Williams v. Rogers*, 14 Bush (Ky.) 776; *Rowe v. Whittier*, 21 Me. 545; *Watson v. Perrigo*, 87 Me. 202; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. R. 593; *Sweet v. Colleton*, 96 Mich. 391; *Stariha v. Greenwood*, 28 Minn. 521; *Holt v. Dollarhide*, 61 Mo. 433; *Green v. Estes*, 82 Mo. 337; *Keithley v. Pitman*, 40 Mo. Ap. 596; *Lee v. Newman*, 55 Miss. 365; *Clay v. Tyson*, 19 Neb. 530; *Berry v. Doremus*, 30 N. J. 399; *Gold v. Phillips*, 10 Johns. (N. Y.) 412; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. D. 387, 9 Cow. (N. Y.) 639; *Smart v. Smart*, 97 N. Y. 559; *First Nat. Bank v. Chalmers*, 144 N. Y. 432; *Wynn v. Wood*, 97 Pa. St. 216; *Moore v. Stovall*, 2 Lea, 543 (overruling *Campbell v. Findley*, 3 Humph. 330); *Lookout Co. v. Houston*, 85 Tenn. 224; *McCrary v. Van Hook*, 35 Tex. 631; *Morris v. Gaines*, 82 Tex. 255; *Fullam v. Adams*, 37 Vt. 391; *Keyes v. Allen*, 65 Vt. 667; *Silsby v. Frost*, 3 Wash. T. 388; *Gilmore v. Skookum Box Factory*, 20 Wash. 703; *Hoile v. Bailey*, 58 Wis. 434; *Martin v. Davis*, 80 Wis. 376; *Lang v. Henry*, 54 N. H. 57; *Wood v. Moriarty*, 15 R. I. 518, 16 R. I. 202; *Aldrich v. Carpenter*, 160 Mass. 166, 170.

55. *Browne State Fr. (5th Ed.)*, sec. 187; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. R. 476; *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. R. 693; *Fullam v. Adams*, 37 Vt. 391; *Schaaber v. Bushong*, 105 Pa. 514; *McKenzie v. Nat. Bank*, 9 Wash. 442, 43 Am. St. R. 844; *Lippincott v. Ashfield*, 4 Sandf. (N. Y.) 611.

56. *Olmsteadt v. Greeley*, 18 Johns. (N. Y.) 12; *Dock v. Boyd*, 93 Pa. St. 92; *Gower v. Stuart*, 40 Mich. 747 (semble); *Baldwin Coal Co. v. Davis*, 15 Col. App. 371; *Smith v. Bank*, 110 Pa. 519; *Howes v. McRae*, 21 Pa. Supr. Ct. 592. See also, Cal. Civ. Code, sec. 2794.

debt to a third person, his promise to pay such debt is not within the statute though it be made to the creditor and not to the debtor, and though the liability of the original debtor still remains. It is usually said in such cases that the debt is really to be paid by the original debtor or his property and the promisor is in the attitude of an agent, bailiff or trustee to apply such property upon the debt.⁵⁷

The fact that the guarantor has funds or effects of the principal in his possession, however, will not withdraw his promise from the statute unless he is bound or authorized to apply them upon the debt;⁵⁸ and an oral promise to pay out of a particular fund of the principal is within the statute unless it is actually in the hands of the guarantor or he receives it.⁵⁹

If the guarantor has received from the principal, security or indemnity against the debt sufficient to satisfy only part of it, the Statute of Frauds is doubtless a good defense as to the residue. He may be charged, at law, however, in spite of the statute with the proceeds of the securities received if he collects or disposes of them, or the creditor may be subrogated to them in equity if they are retained by the guarantor.⁶⁰

57. See *Browne Stat. Fr.* (5th Ed.), sec. 206, et seq.; *Williams v. Leper*, 3 Burr. 1886; *Id.*, 2 Wils. 308. To same effect see *Edwards v. Kelly*, 6 Maule & S., 204; *Bampton v. Paulin*, 4 Bing. 264; *Baldwin Coal Co. v. Davis*, 15 Col. App. 371.

58. See *Ackley v. Parmenter*, 98 N. Y. 446, 31 Am. R. 476; *Hughes v. Lawson*, 31 Ark. 613; *Simpson v. Nance*, 1 Speers (S. Car.) 4; *State Bank v. Mettler*, 2 Bosw. (N. Y.) 392; *Gower v. Stuart*, 40 Mich. 747. It seems that in New York at least, the rule that a promise to pay out of the funds of the principal is not within the statute is subject to the exception that if the promise is to pay out of the proceeds, the statute applies, at least until the property is sold and the proceeds realized. *Ackley v. Parmenter*, *supra*.

59. *Peele v. Powell*, 156 N. Car. 553; *Bagley v. Sasser*, 2 Jones. Eq. (N. Car.) 350.

60. See *Jack v. Morrison*, 48 Pa. 113; *Curtis v. Tyler*, 9 Paige (N. Y.) 432; *Harlan Co. v. Whitney*, 65 Neb. 105. Compare *Lippincott v. Ashfield*, 4 Sandf. (N. Y.) 40 with *Shaabber v. Bushong*, 105 Pa. St. 514.

§ 79. **Contracts of Law Merchant—Oral Promise to Indorse—Oral Acceptance or Promise to Accept.** The Statute of Frauds has no application to contracts strictly of the law merchant. Hence, though the terms of the contract are not set out in the endorsement or other contract upon a negotiable bill or note, such contract is not void under the Statute of Frauds, whether made for value or for accommodation.⁶¹ A verbal promise to endorse a negotiable instrument of a third person, however, is held to be within the statute; and this is clearly right, for such verbal promise is not a contract of the law merchant, and is clearly a promise to answer or become answerable for the debt of another.⁶² The rule would seem to be otherwise, however, where the circumstances bring the case within the "main purpose rule." Statutes in most states expressly declare the oral acceptance of a bill of exchange void.⁶³ Where such special statutes do not exist, however, the question remains whether or not such an acceptance is void or unenforceable under the Statute of Frauds as a promise to answer for the debt of another. It would seem that where the bill was drawn against funds of the drawer in the hands of the drawee, such an acceptance would be binding notwithstanding the statute, for it is no more than a promise by the acceptor to pay to the holder what he owes the drawer of the bill. In other words it is a promise by such acceptor to pay his own debt in a particular way.⁶⁴

Where the defendant, in consideration that the plaintiff would purchase a bill already drawn or to be drawn,

61. See Throop, Verbal Agreements, secs. 86, 87; *Frech v. Yawger*, 47 N. J. L. 157, 54 Am. R. 123, and authorities cited.

62. *Taylor v. Drake*, 4 Strob. (S. C.) 431, 53 Am. D. 680; *Carville v. Crane*, 5 Hill (N. Y.) 483, 40 Am. D. 364; *Smith v. Easton*, 54 Md. 138, 39 Am. R. 255-n; *Willis v. Shinn*, 42 N. J. L. 138.

63. See *Lewin v. Grieg*, Jones & Wood, 115 Ga. 127; *Paff v. Cummings*, 67 Mich. 143; *Anderson v. Jones*, 102 Ala. 537. This is the rule of the uniform Negotiable Instrument Act.

64. See *Walton v. Mandeville*, 56 Ia. 597, 41 Am. R. 123; *Manley v. Geagan*, 105 Mass. 445; *Pierce v. Kittridge*, 115 Mass. 374; *Ragdale v. Gresham*, 141 Ala. 308. Ante sec. 73.

verbally promised to accept it, and the bill was drawn and purchased upon the credit of such promise to accept, such verbal promise was held binding under the Statute of Frauds.⁶⁵ The reasoning of the court was that this constituted an original undertaking because, though the consideration moved to a third party, the drawer, it was the inducement to the payee for taking the bill. He paid his money upon the faith of it and was entitled to be reimbursed. If A says to B, pay so much money to C and I will repay it to you, it is an original, independent promise. And if the money is paid upon the faith of it, it has always been deemed an obligatory contract, even though it be by parol, because there is an original consideration moving between the immediate parties to the contract. This case, however, has not escaped criticism, and it would certainly seem that where the drawer of the bill remains liable for what was received by him, either upon the bill or otherwise, that the oral acceptance should be held void within the statute as a promise to answer for the debt of another.

If, however, the drawing is without recourse to the drawer, and this was within the bargain of the acceptor, it might very properly be held an original promise. Unless this is the case, it is difficult to see why the oral acceptance is not within the Statute of Frauds just as much as a promise to pay for goods sold to another upon credit and for which the purchaser remains liable. There is certainly no distinct consideration of benefit moving to the oral acceptor such as would bring the case within the "main purpose rule" already discussed.⁶⁶ Clearly, where the bill is already in the hands of the plaintiff when the oral acceptance or promise to accept is made, and the acceptor is not at the time indebted to the drawer, the statute applies,⁶⁷ and this must be law even if it is

65. *Townsley v. Sumrall*, 2 Pet. (U. S.) 170, 182.

66. *Ante*, sec. 69 et seq.

67. *Allen v. Leavens*, 26 Oreg. 164, 46 Am. St. R. 613, 26 L. R. A. 620; *Barnett v. Lumber Co.*, 43 W. Va. 441, 444; *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 109 Am. St. R. 314; Citing *Brown* on

admitted, as some cases hold, that the Statute of Frauds was not meant to apply to contracts of the law merchant,⁶⁸ for an oral acceptance can hardly be deemed to be in any proper sense a contract of the law merchant or negotiable as such. If an oral contract is good at all it must be so upon the footing of the common law, as distinguished from the law merchant.

§ 80. Contracts in Part Within the Statute. Where the defendant's undertaking is both for the debt of another and to do something else which latter undertaking, standing alone, is not within the statute, the true rule appears to be that if the part that is without the statute can be separated from the part that is within it, and is in no wise dependent upon the latter, it may be counted on separately and a recovery had thereon. Thus in *Wood v. Benson*,⁶⁹ the defendant undertook absolutely to pay for gas to be supplied his brother and also to pay for gas already supplied him, and for which he remained liable. The plaintiff having counted separately for the gas supplied and also for the gas to be supplied, was permitted to recover for the latter but not for the former.⁷⁰

§ 81. Fraudulent Representations Affecting the Credit of Another—Lord Tenderden's Act. By the Statute of

Frauds, 174, 2 Rob. Pr. 152; *Quin v. Hanford*, 1 Hill. (N. Y.) 84; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Manley v. Geagan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenhood*, 29 Cal. 600; *Walton v. Mandeville*, 56 Ia. 597, 41 Am. R. 123. See also *Morse v. Massachusetts Nat. Bank*, Holmes (U. S.) 209 Fed. Cas. No. 9857, and see *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. R. 18.

68. See *Daniel Neg. Inst.* (3rd Ed.), sec. 567; *Barker v. Prentiss*, 6 Mass. 430; *Pillans v. Van Mierop*, 3 Burr. 1674.

69. 2 Camp. & J. 94, distinguishing earlier cases.

70. *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. D. 131, overruling *Loomis v. Newhall*, 15 Pick. (Mass.) 159, is in accord with the principal case. See to the same effect *Haynes v. Nice*, 100 Mass. 327, 1 Am. R. 109; *Campbell v. Barkley*, 90 Mich. 35; *King v. Edmiston*, 88 Ill. 257; *Noyes v. Humphries*, 11 Grat. (Va.) 636, 653; *Crawford v. Morrill*, 8 Johns. (N. Y.) 253. See also *Alexander v. Ghislin*, 5 Gill. (Md.) 132; *Duncan v. Blair*, 5 Denio (N. Y.) 196; *Flournoy v. Van Campen*, 71 Cal. 14.

Frauds Amendment Act,⁷¹ commonly known as Lord Tenderden's Act, no representation or assurance as to the conduct, character, credit, ability, trade or dealings of any other person in order to obtain him credit can be sued on unless in writing and signed. Similar statutes are found in a number of our states. The object of such legislation is to prevent the evasion of the Statute of Frauds as originally passed by treating an oral promise to answer for the obligation of another as a false representation as to his conduct, character, credit, etc., giving rise to an action on the case for deceit, as was held in the leading case of *Pasley v. Freeman*⁷² and in subsequent cases in England and here.

71. 9 Geo. IV, c. 14.

72. 3 Term R. 51, 2 Sm. L. Cas. (8th Ed.) 66; *Trapp v. Lee*, 3 B. & P. 367; *Lynde v. Bernard*, 1 M. & W. 101; *Upton v. Vail*, 6 Johns. (N. Y.) 181, 5 Am. D. 210 and note. Generally, in order to render the defense of the statute available, there must be (1) a representation as to the character, conduct, credit etc., of a third person, and such representation must be necessary to the plaintiff's case, and (2) such representation must be made with purpose that it be relied upon and credit given or money or property transferred to such third person. Representations of this kind are never actionable unless relied upon, though they need not be the sole inducement for the plaintiff's acts. Further on this subject see *Browne Stat. Fr.* (5th Ed.) sec. 181 et seq.; *Huntington v. Wellington*, 12 Mich. 10; *Kemp v. Nat. Bank of the Republic*, 109 Fed. R. 48, 48 C. C. A. 213, and authorities cited and discussed; *Stannard v. Kingsbury*, 179 Mass. 174; *Walker v. Russell*, 186 Mass. 69 and cases cited.

CHAPTER VII.

FORM OF WRITING NECESSARY TO SATISFY THE STATUTE OF FRAUDS. CONFLICT OF LAWS AS TO THE STATUTE.

§ 82. **In General.** The Statute of Frauds provides that the contract or "*some note or memorandum thereof*" shall be made in writing. From this it follows that no particular form of writing is necessary to satisfy the statute so long as it substantially evidences the real transaction, and in states where the consideration must be expressed, contains words adequate to express it.¹ Aside from this it may be wholly informal. It may be in the form of a letter,² a receipt,³ an order,⁴ or the vote of a corporation entered on its books, or in any other form provided it expresses the substance of the transaction.⁵ It need not consist of a single paper so long as the connection between several papers, one of which is signed by the surety or guarantor, appears either by direct reference or from the context, so that parol evidence is not necessary to connect them.⁶

§ 83. **When the Writing Must be Made—Delivery not necessary.** The statute requires that "the contract or

1. Post, next section and secs. 86, 87.

2. Sanderson v. Jackson, 2 B. & P. 238; Choate v. Hoogstraet, 105 Fed. Rep. 713, 46 C. C. A. 174.

3. Ellis v. Deadman, 4 Bibb, (Ky.) 466; Barickman v. Kuykendall, 6 Blackf. (Ind.) 21.

4. Learned v. Wannemacher, 9 Allen (Mass.) 412.

5. 1 Brandt, Sur. & Guar. (3rd Ed.) sec. 91; and authorities cited.

6. Jacob v. Kirk, 2 Moody & Rob. 221; Clinan v. Coöke, 1 Schoales & Lefroy, 22; Moale v. Buchanan, 11 Gill & Johns. (Md.) 314; Wiley v. Robert, 27 Mo. 388; Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. D. 196; Freeport v. Bartol, 3 Greenl. (Me.) 340; Nichols v. Johnson, 10 Conn. 192; Abeel v. Radcliff, 13 Johns (N. Y.) 297; 7 Am. D. 377; Ide v. Stanton, 15 Vt. 685, 40 Am. D. 698; O'Donnell v. Leeman, 43 Me. 158, 69 Am. D. 54; Adams v. McMillan, 7 Port. (Ala.) 73; Blair v. Snodgrass, 1 Sneed (Tenn.) 1; Boydell v. Drummond, 11 East, 142; Wilkinson v. Evans, Law Rep. 1 C. P. 407. /

some note or memorandum thereof be made in writing." If the contract itself is in writing, no note or memorandum of it is necessary. If it is oral, however, the statute is satisfied by a note or memorandum made at any subsequent time provided it is made before suit.⁷ Unlike a written contract taking effect by delivery, the memorandum, being evidentiary merely, need not pass between the parties.⁸ Letters or a signed memorandum passing between a promisor and his own agent,⁹ or between the promisor and a stranger, having been held insufficient.

§ 84. Contract or Memorandum Must be Signed—Sufficiency of the Signing—Parties. As in other cases falling within the fourth and seventeenth sections of the Statute of Frauds, the guarantor's contract, or the note or memorandum of it, must be signed by him or by his lawfully authorized agent. The agent need not be authorized by writing so long as he has authority in fact, or an apparent authority for which the principal is responsible.¹⁰ Even if the agent signs his own name instead of that of the principal, parol evidence will be admitted to charge the principal.¹¹

If the document is not signed by the party to be charged or his agent, however, it is worthless even though it be written throughout by the guarantor or his agent.¹² The signature need not be on any particular part of the paper, however, if it is placed there to authen-

7. Browne Stat. Fr. (5th Ed.), sec. 352a, 346; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Eilbert v. Finkbeiner*, 68 Pa. 243, 8 Am. Rep. 176; *Bird v. Munroe*, 66 Me. 337, 22 Am. R. 571; *Shievewright v. Archibald*, 17 Q. B. 107, 114.

8. *Gibson v. Holland*, L. R. 1 C. P. 1.

9. *Gibson v. Holland*, *supra*; *Singleton v. Hill*, 91 Wis. 51, 51 Am. St. R. 868.

10. 1 Brandt Sur. & Guar. (3rd Ed.), sec. 101; *Coles v. Trecothick*, 9 Ves. Jr. 234.

11. *Wilson v. Hart*, 7 Taunt. 295; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 447; *Dykers v. Townsend*, 24 N. Y. 57; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. D. 661.

12. *Hawkins v. Holmes*, 1 P. Wms. 770; *Barry v. Law*, 1 Cranch (C. C.), 77; *Anderson v. Harold*, 10 Oh. 399.

ticate the writing,¹³ unless the statute, as in a few states, requires that the contract or memorandum be "subscribed." In this last case the signature must be at the end.¹⁴

The signature may be by mark,¹⁵ or it may be printed or stamped, though a printed signature may not be sufficient to satisfy the requirement of subscription.¹⁶

Though the memorandum must show both parties to the contract, unless it is addressed generally,¹⁷ it need be signed only by "the party to be charged," who is of course the guarantor.¹⁸ It may be signed by an agent of the guarantor and the authority of such agent need not be in writing, though the creditor cannot in any case act as agent of the guarantor in signing.¹⁹

§ 85. Whole Contract Must Appear. Where a writing is necessary under the Statute of Frauds, however, it must show the whole contract in all its essential terms, and parol evidence cannot be resorted to to supply essential terms or conditions actually agreed upon but not expressed,²⁰ though such evidence is admissible to show

13. *Clason v. Bailey*, 14 Johns. (N. Y.), 484; *Barry v. Coombe*, 1 Pet. (U. S.), 640, 650; *Drury v. Young*, 58 Md. 546, 42 Am. R. 343; *McMillen v. Terrell*, 23 Ind. 163. Whether the signature was placed where it was for the purpose of authentication or whether it was withheld from the usual place because the party declined to complete the document, is a question for the jury. *Johnson v. Dodgson*, 2 Mees. & W. 653; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. D. 196.

14. *Coon v. Rigden*, 4 Col. 275, 282; *James v. Patten*, 6 N. Y. 9, 55 Am. D. 378; *Coe v. Tough*, 116 N. Y. 273; *Cal. Canneries Co. v. Scatena*, 117 Cal. 447.

15. *Baker v. Dening*, 8 A. & E. 94; *Brown v. Bank*, 6 Hill, 443, 41 Am. D. 755; *Jackson v. Van Deusen*, 5 Johns. (N. Y.) 144, 4 Am. D. 330.

16. *Ferguson v. Trovaten*, 94 Minn. 209.

17. Post, sec. 96.

18. See *Mizell v. Burnett*, 49 N. Car. (4 Jones L.) 249, 69 Am. D. 744; *Browne Stat. Fr.* (5th Ed.) secs. 365, 366.

19. *Farebrother v. Simmons*, 5 B. & Ald. 333; *Browne Stat. Fr.* (5th Ed.) sec. 367 and cases cited.

20. See *Browne Stat. Fr.* (5th Ed.), sec. 371; *Holmes v. Mitchell*, 7 J. Scott (N. S.), 361, 12 Eng. Rul. Cas. 464; *Champion v. Plummer*,

the situation and circumstances of the parties in aid of the interpretation of ambiguous or equivocal terms.²¹ If it appears that the memorandum does not embody the whole agreement it is worthless.²²

But though the whole promise or agreement must be evidenced by writing, its acceptance need not be, even where the consideration is required to be expressed, for oral proof of acceptance would in most cases do no more than show that the consideration had been furnished.²³

§ 86. **Same—Must the Writing Express the Consideration?** Under the English Statute of Frauds “the *agreement*, or some note or memorandum thereof” was required to be in writing. Upon a narrow and technical construction it was held that the terms “agreement,” as used therein, embraced not only the promise of the guarantor, but the consideration upon which it was based, and that consequently the written agreement or memorandum was insufficient unless it expressed the consideration.²⁴ And a number of our courts have followed this rule where the literal wording of the English statute, including the word “*agreement*” was retained.²⁵

1 Bos. & P. (N. R.) 252; *Barry v. Coombe*, 1 Pet. (U. S.) 640; *Stearns v. Hall*, 9 Cush. (Mass.) 31, and cases cited; *Hall v. Soule*, 11 Mich. 494. A few cases, however, seem somewhat to relax this rule. See *Allen v. Bennett*, 3 Taunt. 169; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. (U. S.) 446. See also *Bird v. Blosser*, 2 Ventr. 361; *Johnson v. Dodgson*, 2 Mees. & Wels, 653; *Rowell v. Dunwoodie*, 69 Vt. 111; *Ide v. Stanton*, 15 Vt. 685, 40 Am. D. 698.

21. Post, sec. 92. *Merchants Nat. Bank v. Cole*, 83 Oh. St. 50; Ann. Cas. 1912 A 779 and note.

22. See *McElroy v. Buck*, 35 Mich. 434; *Allison v. Rutledge*, 5 Yerg. (Tenn.) 193; *Kennedy v. Gamling*, 33 S. Car. 367; *Davis v. Shields*, 26 Wend. 341.

23. *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. Dec. 280, and cases cited.

24. *Wayne v. Warlters*, 5 East. 10, affirmed in *Saunders v. Wakefield*, 4 B. & Ald. 595; *Browne*, Stat Fr. (5th Ed.) sec. 388 and additional English cases cited. See also the reasoning of *Halroyd, J.* in *Saunders v. Wakefield*, *supra*.

25. *Sears v. Brink*, 3 Johns. (N. Y.) 211, 3 Am. D. 475; *Leonard v. Vredenburg*, 8 Johns. (N. Y.), 29, 5 Am. D. 317; *Laing v. Lee*, 20 N. J. L. 337, *Spencer* 337; *Weldin v. Porter*, 4 Houst. (Del.) 236;

The decision in *Wayne v. Warlters*, however, has been much criticised even in England, and the law has been there changed by the Mercantile Law Amendment Act, rendering it unnecessary to express the consideration in cases falling within the provision of the Statute of Frauds relating to special promises to answer for the debt, default or miscarriage of another,²⁶ and similar legislation is found in a number of our states. Most of the American courts, however, refuse to adopt the doctrine of *Wayne v. Warlters*, even though their statutes employ the same terms as the English one, and interpreting the term "agreement" in its popular sense, hold the writing sufficient though it contains no words expressive of consideration, or indicating what the consideration really is.²⁷ In a few states, however, where the English interpretation was adopted, statutes have not changed the rule of *Wayne v. Warlters*, and in a number of them the statute itself in terms requires that the consideration be expressed.²⁸

Sloan v. Wilson, 4 Harr. & J. (Md.) 322, 7 Am. D. 672; *Hutton v. Padgett*, 26 Md. 228; *Hargraves v. Cooke*, 15 Ga. 231. See *Leoat v. Tavel*, 2 McCord Law (S. Car.) 158.

26. 19 and 20 Vic. c. 97, sec. 3. (July 29, 1856.)

27. *Packard v. Richardson*, 17 Mass. 122, 9 Am. D. 123; *Britton v. Angier*, 48 N. H. 420, overruling earlier cases in that state; *Gilligan v. Boardman*, 29 Me. 79; *Sage v. Wilcox*, 6 Conn. 81. (The words contract and agreement appeared in the Connecticut act.) *Shively v. Black*, 45 Pa. St. 345; *Sorrell v. Jackson*, 30 Ga. 901; *Ellett v. Britton*, 10 Tex. 208; *Reed v. Evans*, 17 Ohio, 128; *Dorman v. Bigelow*, 1 (Branch) Fla. 281; *Colgin v. Henley*, 6 Leigh. (Va.) 85; *Fyler v. Givens*, 3 Hill (S. C.) 48; *Wren v. Pearce*, 4 Sm. & Mar. (Miss.) 91; *Hiatt v. Hiatt*, 28 Ind. 53; *Steadman v. Guthrie*, 4 Met. (Ky.) 147; *Smith v. Ide*, 3 Vt. 290; *Ashford v. Robinson*, 8 Ired. (N. C.) 114; *Little v. Nabb*, 10 Mo. 3. Where the statute has read that the "promise or agreement" or "contract or agreement" shall be in writing, the courts have quite generally held that the consideration need not be expressed. *Taylor v. Ross*, 3 Yerg. (Tenn.) 330; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Violet v. Patton*, 5 Cranch (U. S.) 142; *Sage v. Wilcox*, 6 Conn. 81, 84; *Wren v. Pearce*, 4 S. & M. (Miss.) 91; *Ratliffe v. Trout*, 6 J. J. Marsh (Ky.), 506; *Dorman v. Bigelow*, 1 Fla. 323.

28. See *Barker v. Bucklin*, 2 Denio (N. Y.) 45, 43 Am. D. 726; *Brewster v. Silence*, 11 Barb. (N. Y.) 144, 4 Seld. 207; *Wood v. S. S.* 8

§ 87. **What Sufficient Expression of Consideration.** But even in those jurisdictions where the consideration is required to be expressed, either by the direct terms of the statute, or by judicial construction, the phrase "for value received," has quite generally been held sufficient for that purpose.²⁹ But the words, "value received," need not be employed if other and equivalent expressions are used, and where it is apparent or fairly inferable from the face of the writing that such and no other is the consideration, the memorandum is sufficient. Thus, in the leading case of *Stadt v. Lill*,³⁰ the guaranty was in the following words: "I guarantee the payment of any goods which J. Stadt shall deliver to Mr. Nichols, signed," etc., and it was held that it sufficiently appeared that the consideration was the credit to be extended by Stadt to Nichols at the request of the guarantor.³¹

It has been broadly held in a few jurisdictions that

Wheelock, 25 Barb. (N. Y.) 625; *Draper v. Snow*, 20 N. Y. 331, 75 Am. D. 408; *Wyman v. Gray*, 7 Har. & J. (Del.) 409; *Nabb v. Koontz*, 17 Md. 283; *Ordeman v. Lawson*, 49 Md. 135; *Rigby v. Norwood*, 34 Ala. 129; *Evoy v. Tewksbury*, 5 Cal. 285; *Osborne v. Baker*, 34 Minn. 307, 57 Am. R. 55; *Day v. Elmore*, 4 Wis. 190; *Parry v. Spikes*, 49 Wis. 385; *Eppich v. Clifford*, 6 Col. 493.

29. *Dahlman v. Hammel*, 45 Wis. 466; *Edelen v. Gough*, 5 Gill. (Md.) 103; *McMorris v. Herndon*, 2 Bailey (S. C.), 56; *Caldwell v. McKain*, 2 Not. & Mc. C. (S. C.), 555. See also *Lapham v. Barnett*, 1 Vt. 247; *Whitney v. Stearns*, 16 Me. 394; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. D. 317; *Miller v. Cook*, 23 N. Y. 495; *Osborne v. Baker*, supra; *Houghton v. Ely*, 26 Wis. 181, 189, 7 Am. R. 52-n, and cases cited; *Kuerner v. Smith*, 108 Wis. 549, 552 and cases cited; *Jansen v. Kuenzie*, 145 Wis. 473, Ann. Cas. (1912 A.), 1241 and note.

30. 9 East, 348.

31. See to the same effect, *Union Bank v. Coster's Exrs.*, 3 N. Y. 203, 53 Am. D. 280; *Church v. Brown*, 21 N. Y. 315; *Laing v. Lee*, 20 N. J. Law, 337; *Hutton v. Padgett*, 26 Md. 228; *Williams v. Ketchum*, 19 Wis. 231; *Gates v. McKee*, 13 N. Y. 232, 64 Am. D. 545. Where, after maturity, the defendant indorsed upon a note, "I hereby guarantee the payment of the contents of the within note, one half within six months and the other half within twelve months," the consideration was held to be sufficiently expressed as the inference was that an extension of time was granted for these periods as the consideration of the guaranty. *Neilson v. Sanborn*, 2 N. H. 413, 9 Am. D. 108.

if the guaranty is made contemporaneously with the contract guaranteed, and is upon⁶ the same paper, the expression of consideration in the principal contract answers for the guaranty, though the guaranty itself contains no words expressive of consideration.³² By the great weight of authority, however, the guaranty must, even under such circumstances, contain words expressive of consideration, as it is strictly collateral and distinct from the contract guaranteed.³³

But where one signs a negotiable instrument, not as an express guarantor, but as co-maker, or as acceptor or indorser³⁴ he is liable though he signed merely for accommodation or as surety for another, and will be bound though the instrument does not contain "value received" or other words importing consideration, for the form of the instrument as well as the surety's contract imports consideration. In any case, however, if the guaranty is itself under seal, this will satisfy the statute.³⁵ It should be borne in mind, however, that words in a memorandum expressive of consideration will not prevent the guarantor from showing affirmatively lack

32. *De Wolf v. Raband*, 1 Pet. (U. S.) 476, 501, 502; *Moses v. Lawrence County Bank*, 149 U. S. 248; *Otis v. Haseltine*, 27 Cal. 80; *Paul v. Stackhouse*, 38 Pa. 302; *Leonard v. Vredenburg*, 8 Johns (N. Y.) 29, 5 Am. D. 317; *Nelson v. Boynton*, 3 Met. (Mass.) 396, 400, 37 Am. D. 148; *Bickford v. Gibbs*, 8 Cush. (Mass.) 154; *Nabb v. Koontz*, 17 Md. 283; *Parkhurst v. Vail*, 73 Ill. 343; *Simons v. Steele*, 36 N. H. 73; *Church v. Brown*, 21 N. Y. 315, with which compare *Brewster v. Silence*, 8 N. Y. 207.

33. *McKenzie v. Farrell*, 4 Bosw. (N. Y.) 192; *Draper v. Snow*, 20 N. Y. 331, 75 Am. D. 408. It has been so held even where a guaranty is endorsed on a promissory note before it is delivered to the payee, and for the purpose of lending it additional credit. *Hall v. Farmer*, 5 Denio (N. Y.), 484; s. c. 2 N. Y. 553; *Van Doren v. Tjader*, 1 Nev. 380, 90 Am. D. 498. Compare *Simons v. Steele*, 36 N. H. 73; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. D. 317.

34. *Casey v. Barbason*, 10 Abb. Pr. (N. Y.) 368; *Steele v. McKinley*, 5 App. Cas. 754, 757; *Spann v. Batzell*, 1 Fla. 338; *Zellweger v. Caffé*, 5 Duer, (N. Y.) 87; *Nelson v. Richardson*, 4 Sneed, (Tenn.), 307; *Turnbull v. Trout*, 1 Hall. 374.

35. *Edelen v. Gough*, 5 Gill, (Md.) 103; *Crocker v. Gilbert*, 9 Cush. (Mass.) 131; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Kuener v. Smith*, 108 Wis. 549, 552.

or failure of consideration as a defense. Not only must the consideration be expressed, but there must be a consideration in fact, unless the guaranty is under seal.³⁶ Furthermore, where the contract is not within the Statute of Frauds, though in form an undertaking of guaranty, the consideration need not be expressed. In such cases the contract is valid as an original undertaking, without writing, and even though it is in writing, the consideration may be shown by evidence aliunde.³⁷

§ 88. Conflict of Laws as to the Statute of Frauds. By the fourth section of the English Statute, "no action shall be brought" upon an oral contract covered by its terms. In view of this fact it is held in England under this section that the statute affects, not the validity of the contract, but its proof, and, hence that an oral contract valid and enforceable where made, is unenforceable in England, for want of writing under the statute.³⁸

It follows from this that an oral contract of guaranty or suretyship, valid and enforceable where made, cannot be enforced elsewhere where the English form of the statute prevails.³⁹ Upon the same reasoning, a guaranty orally made where the statute prevails would be enforceable in a forum where the statute is not in force.⁴⁰ Not all the courts, however, have given assent to these doctrines, and it has been held in a number of jurisdictions that a writing goes to the existence of the contract, and hence that a guaranty made without writing in a state where the statute prevails, cannot be enforced in a

36. As to failure of consideration, see *Ante*, sec. 19.

37. *Dyer v. Gibson*, 16 Wis. 558.

38. *Leroux v. Brown*, 12 C. B. 801. See *Huber v. Steiner*, 2 Scott, 304. This decision has been followed and approved in a number of cases in this country. *Downes v. Cheeseborough*, 36 Conn. 39, 4 Am. R. 29; *Pritchard v. Norton*, 106 U. S. 124, and cases in the next two notes below.

39. See the cases cited *supra*, and *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571; *Heaton v. Eldridge*, 56 Oh. St. 87, 36 L. R. A. 817, 60 Am. St. R. 737, and authorities cited; *Emery v. Burbank*, 163 Mass. 326, 28 L. R. A. 57, 47 Am. St. R. 456 and authorities cited.

40. *Lereaux v. Brown*, 12 C. B. 801.

jurisdiction where it is not in force,⁴¹ a result that would be logical if the contract were made in a state where, as in New York, Wisconsin, Michigan, Nevada, Alabama, Oregon and California, the statute declares that contracts to answer for the debt, default or miscarriage of another "*shall be void*" unless in writing.⁴²

41. Story Conf. L. sec. 252; Decosta v. Davis, 24 N. J. L. 319; Allshouse v. Ramsay, 6 Whart. (Pa.) 331, 37 Am. D. 417; Houghaling v. Ball, 20 Mo. 563; Denny v. Williams, 5 Allen (Mass.) 1; Low v. Andrews, 1 Story. 38. But though the law of the place of performance requires a writing, but that of the forum and of the place of contracting do not require it, the contract is valid. Scudder v. Union Nat. Bank, 91 U. S. 406.

42. See Young v. Dake, 5 N. Y. 463, 467, 55 Am. D. 356; Whiting v. Ohlert, 52 Mich. 462, 50 Am. R. 265.

CHAPTER VIII.

SCOPE AND INTERPRETATION OF CONTRACTS OF SURETYSHIP AND GUARANTY.

§ 89. **Scope of Surety's Undertaking—In General.** Broadly speaking the obligation of the surety is dependent upon, and is measured by, that of his principal.¹ This rule is distinctly general, however, and is subject to numerous exceptions, some of which have already been noted. Thus, the incompetency of the principal in no wise prevents the surety from being liable in the absence of fraud or illegality,² and the rule has of course little or no application to indorsers or other sureties of the law merchant, or against innocent assignees for value of guaranteed contracts which are in their nature assignable, where the guarantee is an incident of the assignment.³ Neither, as a general rule, is the surety discharged by the discharge of the principal by mere operation of law, as in bankruptcy or insolvency or under Statutes of Limitations.⁴ Indeed the rule itself is chiefly exemplified in the doctrine that whatever discharges the obligation of the principal likewise discharges the surety, and that any material alteration in the principal contract either as to the time or mode of performance will release the surety. To further discuss of this rule, therefore, would be to re-state what has already been stated, or to discuss what would have to be repeated later on. In fact a further consideration here of the meaning and scope of the principle first stated would be of doubtful utility in view of its extremely general nature. Furthermore, it will be readily understood

1. That a judgment establishing the non-liability of the principal protects the surety see Post, sec. 253.

2. Ante, sec. 20 et seq.

3. Ante, sec. 49; Post, sec. 113.

4. Post, secs. 195 et seq.

that the surety or guarantor may be bound for part only of the undertaking of his principal, if that is the meaning of his contract as reasonably interpreted,⁵ so that his own contract rather than that of the principal, strictly speaking, is often the measure of his liability. On the other hand the surety may undertake for more than the principal does. As to the excess, however, he is not a surety at all but a principal.

§ 90. Interpretation in General—the Rule of Strictissimi Juris. Having considered the nature, form and requisites of contracts of guaranty and suretyship, it is important to ascertain generally the scope of the surety's undertaking, which involves, of course, the rules by which such contracts are construed, before considering in detail the limits and incidents of the surety's liability.

As a general proposition a surety or guarantor is a favorite in the law and is entitled to stand upon the strict terms of his undertaking, once the scope and meaning of these terms are ascertained. "To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further."⁶ The reason of this rule is found in the fact that his undertaking is often entered into gratuitously or for a mere nominal consideration and as an act of friendship or accommodation, and is hence particularly onerous and burdensome.

It has been said in many of the older and a number of modern decisions however, and has been reiterated by text writers, that the undertaking of a guarantor or surety is strictissimi juris, and that a strict construction in favor of the guarantor or surety of the language employed should be adopted and all doubts resolved in his favor.⁷ In spite of this it is the better and practically

5. See *Eaton v. Harth*, 45 Ill. App. 355.

6. See *Bacon v. Chesney*, 1 Stark. 192; *Stamford, etc. Banking Co. v. Ball*, 4 De G. F. & J. 310; *Miller v. Stewart*, 9 Wheat. (U. S.) 681—per Story, J.; *Schreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. R. 626 and cases cited.

7. See *Russell v. Clark*, 7 Cranch (U. S.) 90; *Nicholson v. Paget*, 5 C. & P. 395.

universal modern opinion, that the words used in such a contract should be construed the same way as the words used in other contracts, reasonably and with a view to ascertaining the true meaning and intention of the parties, and that the same rules should be applied as in ascertaining the meaning of the language employed as in other cases of doubt and dispute.⁸ And it has recently been said that the rule of *strictissimi juris* as applied to contracts of suretyship is a rule for the application of such contracts after their meaning has been ascertained, and not properly a rule of construction at all.⁹ In other words, the meaning of the language actually used in such contracts is to be ascertained by the same rules and principles and with reference to the same extrinsic facts and circumstances, as is the meaning of any other contract;¹⁰ but when the meaning of the terms

8. 1 Brandt, Sur. & Guar. (3rd. Ed.) sec. 103 and the numerous cases cited and discussed. Halsbury's Laws of Eng. Vol. 15 pp. 474, 479, 480; Wier Plow Co. v. Walmsley, 110 Ind. 242; Greiswold v. Hazels, 62 Neb. 888; Kirschbaum v. Blair, 98 Va. 35; State ex rel Patterson v. Tittman, 134 Mo. 162; Beers v. Strimple, 116 Mo. 179; W. W. Kimball Co. v. Baker, 62 Wis. 526; Freise v. Einstein, 5 Mo. App. 78. Thus, where the surety undertakes for the construction of a building by a principal who is to do the work and *furnish the materials*, the surety is liable if valid liens are filed against the premises, though the bond says nothing directly as to such liens. To hold that the contract to furnish the labor and materials is complied with by the mere erection of the building for which the owner is compelled to pay large sums beyond the contract price, on account of labor and materials to free his property from liens, would be to keep the word of promise to the ear but break it to the hope. It is not furnishing the labor or material in any substantial way. Classon v. Billman, 161 Ind. 610; Meyers v. Lane, 116 Ky. 566; Friend v. Ralston, 35 Wash. 430; Stoddard v. Hibbler, 156 Mich. 335 (1909), 24 L. R. A. (N. S.) 1075-n, and cases cited and discussed. The contra cases of Gatto v. Warrington, 37 Fla. 542, and Boas v. Maloney, 138 Cal. 105, exhibit an apparently wrong application of the doctrine of *strictissimi juris*.

9. Hurlburt v. Kephart, 50 Col. 353. See to the same effect 1 Brandt Guar. & Sur. (3rd Ed.) secs. 103 et seq; McNeil v. Gossard, 6 Okla. 363.

10. Bowman v. Read, 2 Wall. (U. S.) 591; Merchants Nat. Bank v. Cole, 83 Oh. St. 50, Ann. Cas. 1912 A. 779; Lowry v. Adams, 22 Vt. 160; Ulster Co. Savings Institution v. Young, 161 N. Y. 23, 30, and cases cited.

employed has been thus ascertained, the surety has a right to stand upon the strict terms of his undertaking, which will not be extended by implication to persons, subject matters, or periods of time not embraced within those terms. He is not liable upon any implied engagement where a party contracting in his own interest might be, and has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not,¹¹ and the contract is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it.¹²

§ 91. **Same—Commercial Guaranties.** With respect to commercial guaranties, including letters of credit, as distinguished from bonds which are usually entered into with deliberation, it has been said that they “ought to receive a liberal interpretation.” By liberal interpretation it is not meant that words should be forced out of their natural meaning, but simply that they should receive a fair and liberal interpretation so as to attain the object for which the instrument was evidently designed and the purpose to which it was intended to be applied. Such instruments are generally drawn up by merchants in brief language; sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis for extensive credits.¹³ Upon this and similar reasoning the rule has frequently been

11. Post, secs., 209 et seq; 1 Brandt Sur. & Guar. (3rd Ed.) sec. 103; Hargreave v. Smee, 6 Bing. 244; Gates v. McKee, 13 N. Y. 232, 64 Am. D. 545; Smith v. Mollieson, 148 N. Y. 241, and authorities cited; Shreffler v. Nadelhoffer, 133 Ill. 536, 23 Am. St. R. 626.

12. Burge on Suretyship, p. 40; Barns v. Barrow, 61 N. Y. 39, 19 Am. R. 247; Freise v. Einstein, 5 Mo. App. 78.

13. See Allnutts v. Ashenden, 5 M. & G. 392, 44 E. C. L. 210; Bell v. Buren, 1 How. (U. S.) 169; Lawrence v. McCalmont, 2 How. (U. S.) 426; Lee v. Dick, 10 Pet. (U. S.) 482; Booth v. Irving Nat. Bank, 116 Md. 668.

applied with respect to commercial guaranties at least, that where, after the application of such aids to construction as are permissible in the case of other contracts, there still remains what may fairly be deemed an ambiguity, it must be taken most strongly against the guarantor and in favor of the creditor who has parted with his money or property on the faith of it,¹⁴ though the language employed should not be strained beyond any meaning it might fairly and reasonably import for the purpose of imposing an enlarged liability.¹⁵ This is the familiar rule of construction applicable to most contracts, at least where the language employed may fairly be deemed to have been chosen by, or emanate from, the promisor rather than the promisee.

The English cases on suretyship also accord generally with this rule, and when other rules of construction fail, and only then, the maxim *verba chartarum fortius accipiuntur contra proferentem* is held applicable, at least to commercial guaranties, and it would appear to more formal contracts of suretyships.¹⁶ In some

14. *Lee v. Dick*, 10 Pet. (U. S.) 482; *Drummond v. Prestman*, 12 Wheat. (U. S.) 515; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Bell v. Buren*, 1 How. (U. S.), 169; *Scott v. Myatt*, 24 Ala. 489; 60 Am. D. 485; *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. R. 64; *Tootle v. Elgutter*, 14 Neb. 158, 45 Am. R. 103; *Hoey v. Jarman*, 39 N. J. L. 523; *Dobbin v. Bradley*, 17 Wend. (N. Y.) 422; *Gates v. McKee*, 13 N. Y. 232, and cases cited in the opinion and in the note in 64 Am. D. 545; *Ringe v. Judson*, 24 N. Y. 64; *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. R. 505; *Swisher v. Deering*, 104 Ill. App. 572, affirmed in 204 Ill. 302; *Mamerow v. Nat. Lead Co.*, 206 Ill. 626, 99 Am. St. R. 196; *Bridgeport Malleable Iron Co. v. Iowa Cutlery Works*, 130 Ia. 736; *Tischler v. Hofmeier*, 83 Va. 35; *Hartwell v. Moss*, 22 R. I. 583. In *Smith v. Mollieson*, 148 N. Y. 241, the case of a contractor's bond, substantially the same rule was applied. See also *National Exchange Bank v. Gay*, 57 Conn. 224, 4 L. R. A. 343, and cases cited Post, secs. 97 et seq., as to continuing and non-continuing guaranties.

15. *Schwartz v. Hayman*, 107 N. Y. 560; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. R. 204; *Gay v. Ward*, 67 Conn. 147, 32 L. R. A. 818.

16. See *Mayer v. Isaac*, 6 M. & W. 605; *Mason v. Pritchard*, 12 East. 227; *Wood v. Priestner*, L. R. 2 Exch. 66; *Hargreave v. Smee*, 6 Bing. 244.

of our jurisdictions the rule of strict construction seems to be applied even to commercial guaranties.^{16a}

§ 92. Parol or Extrinsic Evidence in Aid of Interpretation—Interpretation by Parties. Where the language of a contract of guarantee or suretyship is ambiguous and susceptible of more than one interpretation, parol evidence will be freely admitted as in the case of other written contracts, not for the purpose of varying or contradicting the writing, but for the purpose of showing the situation and circumstances of the parties, the subject matter and their motives and object in entering into it.¹⁷ Furthermore, any existing or contemporaneous transaction or document to which the surety's contract refers or relates or which it secures should be given its due weight in determining the meaning and scope of his undertaking,¹⁸ and where the parties, by their acts under the guaranty, have given it a so called "practical construction," such construction will prevail unless it is contrary to any meaning that its language will reasonably bear.¹⁹

§ 93. Construction of Contract of Corporate Surety in Nature of Insurance Policy. Where bonds are issued to secure the faithful and proper performance of public or private trust or of a public or private contract, not by individual sureties acting gratuitously, but by companies chartered for the purpose of issuing such securities as a business, for a consideration of premium fixed

16a. *Merchants' Nat. Bank v. Cole*, 83 Oh. St. 50, Ann. Cas. 1912 A. 779.

17. *Bell v. Buren*, 1 How. (U. S.) 169; *Lowry v. Adams*, 22 Vt. 160; *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. D. 713; *Merchants Bank v. Cole*, 83 Oh. St. 50, Ann. Cas. (1912 A), 779 and note; *Bank of New Zealand v. Simpson*, (1900), App. Cas. 182, P. C.; *Heffield v. Meadows*, L. R. 4 C. P. 595. See also Post, sec. 96.

18. *Weed Sewing Mach. Co. v. Winchell*, 107 Ind. 260, and cases cited; *Grocers Bank v. Kingman*, 16 Gray (Mass.) 473; *Rice v. McCague*, 61 Neb. 861.

19. *Michigan State Bank v. Peck*, 28 Vt. 200; 65 Am. D. 234; *In re Neffs Est.*, 185 Pa. St. 98; *St. Paul Title & Tr. Co. v. Sabin*, 112 Wis. 105.

by them, the almost overwhelming weight of authority regards their undertakings as in the nature of policies of insurance, rather than contracts of suretyship merely, and a strict construction is to be given them *against* the company, all ambiguities in the language used being resolved in favor of the beneficiary so long as violence is not done to the plain and palpable meaning of the words actually employed. In other words, compensated surety companies, unlike the private or "friendly" surety, cannot invoke the principle *strictissimi juris*.²⁰ But this rule of construction cannot be availed of to refine away terms of the contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements compliance with which is made the condition of liability thereon.²¹

Furthermore, as to these contracts, as we have seen the doctrines of warranty,²² and to some extent, mis-

20. Richards on Ins. (3rd Ed.) p. 656; citing *American Surety Co. v. Pauly*, 170 U. S. 144; *Mechanics' Savings Bank & Tr. Co., v. Guarantee Co.*, 68 Fed. 459; *Bryant v. American Bonding Co.*, (Ohio St. 1907), 82 N. E. 960; *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. Car., 320, 83 Am. St. R. 682, S. C., 128 N. Car., 366, 83 Am. St. R. 662; *Cowles v. U. S. Fidelity & Guaranty Co.*, 32 Wash. 120, 98 Am. St. R. 838, and note; *Guaranty Co. of N. A. v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146. See also to the same effect *Frost Guar. Ins.* (2nd Ed.), secs. 36 et seq. *Van Buren County v. Am. Surety Co.*, 115 N. W. 24 (Iowa, 1908); *Shakman v. U. S. Credit Co.*, 92 Wis. 366, 53 Am. St. R. 920, 32 L. R. A. 383; (credit Insurance) *Fenton v. Fidelity Co.*, 36 Oreg. 283, 48 L. R. A. 770; *People v. Rose*, 174 Ill. 310, 44 L. R. A. 124; *United Am. Fire Ins. Co. v. Am. Bonding Co.*, 146 Wis. 573, 582, 40 L. R. A. (N. S.) 661 and cases cited; *Hormel v. Am. Bonding Co.*, 112 Minn. 288, 33 L. R. A. (N. S.) 513 and cases cited in the opinion and the note; *Crystal Ice Co. v. United Sur. Co.*, 159 Mich. 102. But see *Howard County v. Hill*, 88 Md. 111; *Harrisburg S. & L. Assn. v. U. S. Fidelity & Cas. Co.*, 197 Pa. St. 177; *Ulster Co. Savings Inst. v. Young*, 161 N. Y. 23; *Lonergan v. San Antonio Loan & Tr. Co.*, 101 Tex. 63, 22 L. R. A. (N. S.) 364, 130 Am. St. R. 803. See also Post, sec. 187 as to the construction of the terms in such bonds pertaining to notice of default.

21. *Am. Surety Co. v. Pauley*, 170 U. S. 144; *Guaranty Co. of N. A. v. Mechanics etc. Co.*, 183 U. S. 402.

22. Ante, sec. 53; *Livingston v. Fidelity Deposit Co.*, 76 Oh. St. 253, (1907); *Willoughby v. Fidelity etc. Co.*, 16 Okla. 546, 7 L. R. A. (N. S.) 548-n and cases cited.

representation,²³ familiar to general insurance law are usually held applicable, whether they are termed policies or bonds, and the same is true of the rules as to the powers of general agents.²⁴

But though a bond or undertaking given in the course of judicial proceedings is executed by a surety company, it seems that the same construction will be given it as if it were executed by a private individual, the most cogent reason for this rule being that the terms of such obligations are not, as in other cases, chosen by the company, but are determined by law or immemorial practice, and that it would be manifestly inconvenient to have such a security mean one thing when executed by private persons, and another when executed by a corporate surety.²⁵

§ 94. Same—"Larceny or Embezzlement" and Other Terms Descriptive of the Risk. Pursuant to the rules both of liberal and reasonable construction, the words larceny and embezzlement as used in the ordinary fidelity bond by which the company undertakes to make good losses sustained by the employer by "larceny or embezzlement" of the employee, or "fraud or dishonesty amounting to larceny or embezzlement," the latter words are interpreted in their generic rather than their strict legal sense. It is not necessary in order to establish the liability of the company, therefore, that the facts should be sufficient to sustain a conviction for common law or statutory larceny, or for the statutory offense of embezzlement; it is enough that the conduct of the insured amounts to an intentional or fraudulent breach of trust or duty due from the employee in the fiduciary capacity described

23. *Willoughby v. Fidelity etc. Co.*, *supra*; *Ante*, sec. 52.

24. *Crystal Ice Co. v. United Surety Co.*, 159 Mich. 102.

25. See *Frost Fid. & Guar. Ins.*, (2nd Ed.) p. 244 et seq. See *in re Thurbur*, 43 N. Y. App. Div. 528 and the opinion in the court above in 162 N. Y. 144. Compare *Griffin v. Zuber*, 52 Tex. Civ. App. 288, with *Lonergan v. San Antonio Loan & Tr. Co.*, 101 Tex. 63, 22 L. R. A. (N. S.) 364, 130 Am. St. R. 803.

in the bond,²⁶ as distinguished from the mere non-payment of a debt due from him to his employer.²⁷

Various other phrases have been used in fidelity bonds, most of which have been interpreted or to some extent explained by the courts. The term "dishonesty" signifies lack of probity or integrity on the part of the risk, and apparently implies a conscious or intentional abuse of the confidence placed in the risk by virtue of his employment, and not mere negligent failure, without dishonest purpose, to discharge the duties of his employment,²⁸ or to pay the debts contracted in favor of the insured;²⁹ and even the dishonesty of the employee injurious to the insured is not sufficient to fix liability upon the company if it is in a matter foreign to the duties to which the guaranty of honesty relates.³⁰

Where the bond insures against the negligence of the risk it is commonly interpreted to mean want of such care and prudence in the discharge of the bonded duties as the circumstances of the case reasonably demand, and the question is commonly for the jury.³¹ And a bond conditioned that the insured shall well and faithfully perform the duties of his position would appear to secure against negligence.³² Where the bond simply secures against "fraud and dishonesty" or "fraud and

26. *Am. Bonding & Trust Co. v. Milwaukee Harvester Co.*, 91 Md. 733; *Champion Ice M'fg. etc. Co. v. Am. Bonding Co.*, 115 Ky. 863, 103 Am. St. R. 356; *City Trust etc. Co. v. Lee*, 107 Ill. App. 263, affirmed in 204 Ill. 69. But see *Reed v. Fidelity etc. Co.*, 189 Pa. St. 596.

27. See *Matthews v. Employers Liability Assur. Corp.*, 127 App. Div. 195, 111 N. Y. Supp. 76; *Milwaukee Theatre Co. v. Fidelity & Cas. Co.*, 92 Wis. 412; *U. S. Fid. & Guar. Co. v. Overstreet*, 27 Ky. Law 248; *Monongahela Coal Co. v. Fid. & Dep. Co.*, 94 Fed. 732, 36 C. C. A. 444.

28. See *Sinclair v. National Surety Co.*, 132 Ia. 549.

29. *Knitting Mills v. Guaranty Co.*, 137 N. Car. 565.

30. *Livingston v. Fidelity & Deposit Co.*, 76 Oh. 253.

31. See *Citizens Ins. Co. v. Grand Trunk Ry.*, 16 L. J. Q. B. 334 (Quebec); *City Trust etc. Co. v. Fid. & Cas. Co.*, 58 App. Div. 18, 68 N. Y. Supp. 601.

32. See *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, *Sherman v. Harbin*, 125 Ia. 175.

dishonesty amounting to larceny and embezzlement," however, it is clear that the mere negligent acts of the risk are not covered.

§ 95. Same—Credit Indemnity Bonds—"Insolvency," "Failure," etc. In a credit indemnity bond prepared for use in the states of the union generally, insuring against loss through the insolvency of debtors who have made a general assignment for the benefit of creditors, the phrase "assignment for the benefit of creditors" was interpreted, not in any narrow, technical or local sense, but in its popular or general sense, as including any transfer by the debtor of substantially his entire property to a creditor or creditors, so as to close out or wind up his business, the property assigned being delivered and the business discontinued.³³ "Insolvency" or "failure" of debtors in such bonds are ordinarily construed in the general or commercial sense as legally defined and signifies not necessarily a preponderance of liabilities over assets, but the failure of a debtor to pay his debts as they fall due in the ordinary course of business, regardless of an adjudication of bankruptcy or insolvency, unless a clear purpose is manifested to restrict these terms within narrower limits.³⁴ The decisions on this subject, however, are commonly complicated by various limitations in the bond upon the general terms, "insolvency," "failure" and the like, and no further attempt will be made to discuss them here.³⁵

33. *People v. Mercantile Credit Guarantee Co.*, 166 N. Y. 614.

34. *Strause v. Am. Credit, etc. Co.*, 91 Md. 244; compare *Goodman v. Merc. Guar. Co.*, 45 N. Y. Supp. 508, 17 App. Div. 474.

35. See as instructive on this subject *Strause v. Am. Credit etc Co.*, supra; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. R. 920, 32 L. R. A. 383; *Am. Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161; *American Credit Indemnity Co. v. Carrolton Furniture Co.*, 95 Fed. 111, 36 C. C. A. 671; *Hogg v. Am. Credit Indemnity Co.*, 172 Mass. 127; *Sloman v. Credit Guar. Co.*, 112 Mich. 258; *Talcott v. Nat. Credit Co.*, 9 App. Div. 433, 75 N. Y. St. R. 610, 41 N. Y. Supp. 281, affirmed in 163 N. Y. 577; *Jung v. Am. Credit Indemnity Co.*, 180 Fed. 510; *Analine etc. Chemical Co. v. Am. Credit Indemnity Co.*, 228 Pa. 588; *Gray v. Merchants Ins. Co.*, 125 Ill. App. 370; *Philadelphia Casualty Co. v. Cannon & Byers Co.*, 133 Ky. 745.

CHAPTER IX.

GENERAL AND SPECIAL GUARANTIES. CONTINUING, NON-CONTINUING AND LIMITED AND UNLIMITED GUARANTIES. ABSOLUTE AND CONDITIONAL GUARANTIES.

§ 96. **General and Special Guaranties—Defined and Distinguished.** Guaranties are either general or special. A general guaranty is one that is open to acceptance by the public generally, or by any person of the class to whom it is addressed, and will be binding in favor of any person, or any person of the designated class, who accepts it.¹ A special guarantee is one that is addressed to, and can be accepted by, a particular person, firm or corporation only, in whose favor alone it can be held originally binding.²

A guarantee addressed to the principal himself or to no one in particular is ordinarily a general guarantee.³ But whether a guaranty is general or special must depend upon its language as interpreted, if ambiguous, in the light of surrounding facts and circumstances.⁴ Thus, in *Lowry v. Adams*,⁵ the defendant wrote and intrusted to the principal an unaddressed writing, as follows:

Mr. E. N. Drury is buying goods in New York, and what he may want more than he pays for himself I will be responsible for; Verjennes, September 17, 1846. (Signed) Hiram Adams. Drury bought a bill of goods

1. *Lowry v. Adams*, 22 Vt. 160; *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. D. 280-n; *Birkhead v. Brown*, 5 Hill (N. Y.), 634, 642; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. R. 204; *Everson v. Gere*, 122 N. Y. 290.

2. *Strange v. Lee*, 3 East, 484; *Taylor v. Wetmore*, 10 Oh. 491; *Evansville Nat. Bank v. Kaufmann*, supra.

3. *Lowry v. Adams*, supra.

4. *Evansville Nat. Bank v. Kaufmann*, supra; *Lowry v. Adams*, 22 Vt. 160. Ante, sec. 90.

5. Supra.

of Sterns & Johnson of New York upon the strength of this letter, which he left with them. Later he purchased additional goods of the plaintiffs on the faith of the same letter, which they had seen in the hands of Sterns & Johnson. Held, that in view of the fact that the principal was a general merchant, and that it was known to the guarantor that he was going to New York to buy stock of various kinds, that the obvious purpose of the guaranty was to give him the necessary credit for this purpose, and that it was not a special guaranty or confined to Sterns & Johnson, who had first acted upon it, and in whose hands it had been left, and by whom it was exhibited to the plaintiff.

In *Evansville National Bank v. Kaufmann*,⁶ defendants, who resided in New York City, wrote a letter addressed to B. Bros., manufacturers, doing business in Indiana, as follows: "Any drafts that you may draw on Mr. A. Feigelstock of our city we guarantee to be paid at maturity." The principal named was a commission merchant in New York. Plaintiff, an Indiana bank, discounted certain drafts drawn by B. Bros. on Feigelstock, the letter being produced by the drawers and left with it as security. No bills of lading or consignments of property to the drawee accompanied the drafts, and one of them appeared upon its face to be accommodation paper. In an action upon the guaranty it did not appear that any consideration therefor was paid to defendants by B. Bros. or Feigelstock, or to the latter by B. Bros. Two of the drafts were not paid. In an action to recover the amount thereof, held, that the guaranty was special, and plaintiff, by discounting the drafts, acquired no right of action thereon in its own right; and, that in the absence of a consideration, no cause of action accrued to B. Bros., and so none passed from them to plaintiff.

In *Taylor v. Wetmore*,⁷ the letter of guaranty was as follows: Messrs. A. D. McBride & Company, Gentle-

6. 93 New York, 273, 45 Am. R. 204.

7. 10 Ohio, 491.

S. S. 9

men: Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar that we will say that we will be responsible to the amount of \$2000 for goods delivered to him. C. W. & S. D. Wetmore.

Held a special guaranty and confined to McBride & Company, to whom it was specifically addressed, though it did not contain words otherwise expressly confining it to them.⁸

§ 97. Continuing and Non-Continuing Guaranties—In General. Whether a guaranty is non-continuing or confined to a single transaction or credit, or continuing and intended to cover and secure a series of transactions or credits as they arise, is sometimes difficult to determine. Upon this question little direct aid can be derived from precedents, as each case must rest upon its own facts, or, in other words, upon the intention of the parties as expressed in their contract when read in the light of the facts and circumstances surrounding them when the contract was made.⁹

In determining whether a guaranty is continuing or not it should, of course, be read in the light of the contract it is intended to secure,¹⁰ and with regard to the situation of the parties at the time it was entered into which may be shown by parol.¹¹ Where the language employed will bear only one construction, however, parol evidence is not admissible to show that a guaranty was intended to be continuing or non-continuing contrary to

8. See also *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. D. 280.

9. 1 *Brandt Sur. & Guar.* (3rd Ed.) Sec. 174. See also *Ante* Sec. 91, where the rules for the construction of guaranties are stated. *Heffield v. Meadows*, 4 O. P. 595. In *Hargreave v. Smee*, 6 Bing. 249 Parke, B., remarks that "all those cases must be decided each on its own ground, and, therefore, it is useless to refer to the decisions except for any principle that may incidentally be laid down in them."

10. See *Sentinel Co. v. Smith*, 143 Wis. 377.

11. *Hotchkiss v. Barnes*, 34 Conn. 27; *Heffield v. Meadows*, *supra*.

its plain terms.¹² The expressions "from time to time," or "until further notice" will usually, if not always, be conclusive of an intention to make a continuing guaranty.¹³ But any language that fairly imports a continuing guaranty will be sufficient, though in cases of ambiguity many courts appear to lean against construing the guaranty as a continuing one unless, from the surrounding facts and circumstances, such a guarantee was plainly intended.¹⁴

§ 98. What Deemed Continuing Guaranty. Where a guaranty is meant to cover a series of transactions, it may be none the less continuing though it fixes a sum beyond which the guarantor is not to be responsible. Thus, "I agree to be responsible for the price of goods purchased of you, either by note or account, by H, at any time hereafter, to the amount of \$1000," was held continuing, so that though H. bought \$1000 worth of goods from the creditor and paid for them and then bought other goods of him in excess of that amount, the guarantor was liable for \$1000 of the balance due the creditor.¹⁵

12. *London Assurance Co. v. Bold*, 6 Q. B. 614; *Boston etc. Co. v. Moore*, 119 Mass. 435; *Indiana Bicycle Co. v. Tuttle* (Conn. 1892), 51 Atl. Rep. 538.

13. *Heffield v. Meadows*, 4 C. P. 595; *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489. But see *Cutler v. Ballou*, 136 Mass. 337, 49 Am. R. 35. See Post, sec. 101.

14. *Melville v. Hayden*, 3 B & Ald. 593; *Cremer v. Higginson*, 1 Mason (U. S.) 323; *Liverpool Waterworks Co. v. Atkinson*, 6 East. 507; *Gay v. Ward*, 67 Conn. 147, 32 L. R. A. 818; *Whitney v. Groat*, 24 Wend. (N. Y.) 82; *Perryman v. McCall*, 66 Ala. 402, 41 Am. R. 752; *Birdsall v. Heacock*, 32 Oh. St. 177, 30 Am. R. 572; *Morgan v. Boyer*, 39 Oh. St. 324, 48 Am. R. 454; *Brittain Co. v. Yearout*, 59 Kan. 684. Compare *Farmers Bank v. Kercheval*, 2 Mich. 504; *Merle v. Wells*, 2 Camp 413; *Mason v. Pritchard*, 12 East. 227; *Belloni v. Freeborn*, 63 N. Y. 383; *Rindge v. Judson*, 24 N. Y. 64; *Rapelye v. Bailey*, 5 Conn. 149, 13 Am. D. 49; *Hartwell v. Moss*, 22 R. I. 583; *Bridgeport Malleable Iron Co. v. Iowa Cutlery Works*, 130 Ia. 736. A guaranty may have a retrospective operation if this intention is clearly expressed. *Merchants Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. R. 434.

15. *Bent v. Hartshorn*, 1 Met. (Mass.) 24, followed in *Toleston & Stetson Co. v. Barck*, 81 Minn. 470; *Henry McShane Co. v. Padin*, 142 N. Y. 207; *Standard Oil Co. v. Hoese*, 57 Neb. 665. See to the

Where a guaranty for future advances is unlimited as to time and amount, it must be understood that the term of credit and the amount of the advances shall be reasonable under the circumstances of the case.^{15a}

§ 99. Examples of Continuing Guaranties. Whether a guaranty is continuing or non-continuing, as has already been said, cannot be determined by fixed rules of construction, nor by reference to decided cases, save as far as they illustrate what the courts have done under the peculiar facts and circumstances of particular cases.¹⁶ A few illustrations of guaranties of both sorts are given here, however, and reference is made to a considerable number of decided cases that will be found more or less suggestive and instructive upon doubtful questions of this kind.

Defendant engaged to guaranty plaintiff "for any goods he hath or may supply my brother, W. P. with, to the amount of 100£" It appeared at the trial that when the guaranty was given, goods had already been supplied to W. P. to the amount of 66£, and another parcel was afterwards supplied amounting to 124£, all of which had been paid for and the sum in dispute was for a further supply of goods to W. P. The Court were unanimous that this was a continuing or standing guaranty

same effect, *Crittenden v. Fiske*, 46 Mich. 70, 41 Am. R. 146; *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. R. 581; *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. R. 504 followed in *Malleable Iron Range Co. v. Pusey*, 244 Ill. 197. But where a guarantor wrote: "Please deliver to A, goods as he may want from time to time, not exceeding \$300, and if not paid for by him within thirty days, I will be responsible for the same." Held not to be a continuing guaranty, but to be exhausted by the first purchase and payment to the amount of \$300. *Sartwell v. Humphrey*, 136 Mass. 337, 49 Am. R. 35. And see also in this connection *Post*, sec. 101; *Kirby v. Marlborough*, 2 M. & S. 18. Where the guaranty is limited in amount but otherwise continuing and the amount due from the principal upon his bankruptcy exceeds the limit of the guaranty, the creditor must apply dividends received by him pro rata between the secured and unsecured portions of the debt. *Bardwell v. Lydall*, 7 Bing. 489.

15a. *Mamerow v. Nat. Lead Co.*, 202 Ill. 629, 99 Am. St. R. 196.

16. *Coles v. Pack*, L. R. 5 C. P. 65, 70.

to the extent of 100£ which might at any time become due for goods supplied until the credit was recalled.¹⁷

Defendant wrote to the plaintiff, a dealer in leather in behalf of McKee, a shoemaker, as follows: "Sir:—I will be responsible for what stock M. C. McKee has had or may want hereafter to the amount of \$500." This was held a continuing guaranty and not exhausted by purchases or payment of stock to the amount mentioned.¹⁸

Where the writing was "In consideration of your supplying Mr. John McGuire with supplies, etc., out of your store for his business, we agree to become responsible for the payment of \$200 for such goods and guarantying the payment of that amount, whether the same be due on note or book account," this was held a continuing guaranty.¹⁹

A letter addressed "To Whom It May Concern:" stated that the bearer, son of the subscriber, was about to establish a store in Portland for books and stationery and now goes to Boston to obtain an assortment for that purpose. He will commence on a limited scale with the intention of enlarging the business next Spring. He wishes to purchase school books, etc. upon a credit of four or six months; miscellaneous books, papers, etc. on commission. For the faithful management of the business and the punctual fulfillment of contracts relating to it, the subscriber will hold himself responsible. Held a continuing guaranty for such purchases as the son may make in the business.²⁰

One, Tully, about to go into business and desiring credit, a relative of his wrote to certain merchants as follows: "Please let Mr. P. Tully have the paints, oils, varnishes, etc. he wants. I will be security for the

17. *Mason v. Pritchard*, 12 East 227, 12 Campb. 436. See also *Merle v. Wells*, 2 Campb. 413; *Wood v. Priestner*, L. R. 2 Exch. 66; *Mayer v. Isaac*, 6 M. & W. 604.

18. *Gates v. McKee*, 13 N. Y. 232, 64 Am. D. 545.

19. *Fennell v. McGuire*, 21 Up. Can. (C. P.) 134.

20. *Mussey v. Rayner*, 22 Pick. (Mass.) 223.

amount for what he will owe you." Held a continuing guaranty.²¹

"Messrs. G. Brothers: Please let my daughter, Mrs. H. have what goods she wants and I will stand good for the money to settle the bills. You will find the pay part all right with her, I think." Held a continuing guaranty.²²

"I hereby guarantee to be responsible for any account due or to become due to X from Z, and to see that such account is paid to the amount of \$500," was held a continuing guaranty under the rules of liberal construction in favor of the creditor.²³

A contract between a newspaper publishing company and an agent provided that it should continue for at least six months and that the agent should promptly pay every month for the papers sent him. By a contract of guaranty executed the same day, defendant agreed "to become responsible for the prompt payment of all bills for such papers to the amount of \$500." Held, that the guaranty was not limited to payment for the first \$500 worth of papers delivered, but was a continuing guaranty, binding defendant to pay for such papers as might be delivered during the life of the contract, not exceeding the sum named.²⁴

21. *Boehme v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485.

22. *Wright v. Griffith*, 121 Ind. 478, 6 L. R. A. 639.

23. *Hartwell v. Moss*, 22 R. I. 583.

24. *Sentinel Co. v. Smith*, 143 Wis. 377. For other cases of guaranty held to be continuing, see *Heffield v. Meadows* (1869), L. R. 4 C. P. 595; *Coles v. Pack* (1869), L. R. 5 C. P. 65; *Bastow v. Bennett* (1812), 3 Camp. 220; *Burgess v. Eve* (1872), L. R. 13 Eq. 450; *Tanner v. Moore* (1846), 9 Q. B. 1; *Merle v. Wells*, 2 Camp. 413; *Woolley v. Jennings* (1826), 5 B. & C. 165; *Simpson v. Manley* (1831), 2 Cr. & J. 12; *Browning v. Baldwin* (1879), 40 L. T. 248; *Laurie v. Scholefield* (1869), L. R. 4 C. P. 622; *Williams v. Rawlinson* (1825), Ry. & M. 233; *Martin v. Wright* (1845), 6 Q. B. 917; *Allan v. Kenning* (1833), 9 Bing. 618; *Nottingham Hide Co. v. Bottrill* (1873), L. R. 8 C. P. 694; *Mayer v. Isaac* (1840), 6 M. & W. 605; *Dry v. Davy* (1839), 10 Ad. & El. 30; *Hitchcock v. Humfrey* (1843), 5 Man. & G. 559; *Hargreave v. Smea* (1829), 6 Bing. 224; *Weston v. Empire Assurance Corporation* (1868), 19 L. T. 305; *Platter v. Green*, 26 Kan. 252; *Clark v. Hyman*,

§ 100. **What Guaranties are not Continuing.** While we repeat that there is no fixed rule of interpretation whereby the continuing or non-continuing character of a guaranty can be determined, the fact that the guaranty was unlimited in amount has sometimes had a controlling influence and induced the Court to hold it non-continuing. Thus: If you will let the bearer have what leather he wants and charge the same to himself, I will see that you have your pay in a reasonable length of time. Held confined to a single transaction. The Court said: "We think it is limited to a single purchase or transaction. We must hold this, or that it is unlimited both as to time and amount. Every person is disposed to have some regard for his own interest and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount unless he has done so in express terms or by clear implication."²⁵ And while contracts of guaranty should be so interpreted as to give full effect to their terms, "If the terms of the contract can be fulfilled by being confined to one transaction, courts are not anxious to extend it to others." Where the language used was as follows: "Whatever goods you sell to A. B., to be sold in our store, we will consent that he may take the money out of our Concern to pay for the same. The said A. B. shall have the liberty of taking the pay out of our Con-

55 Iowa 14; *The Cosgrave Brewing & Malting Co. v. Starrs*, 5 Ont. (Can.) 189; *Cochran v. Kennedy*, 10 Daly (N. Y. Com. Pl.) 347; *Dover Stamping Co. v. Noyes*, 151 Mass. 342; *Crathern v. Bell*, 45 Up. Can. (Q. B.) 473; *Tischler v. Hofheimer*, 83 Va. 35; *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104; *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. R. 581; *Home Savings Bank v. Hosie*, 119 Mich. 116; *Rindge v. Judson*, 24 N. Y. 64; *Lane v. Mayer*, 15 Ind. App. 382; *Nat. Bank v. Thomas*, 220 Pa. St. 360; *Paskusz v. Bodner*, 75 N. J. Law, 447; *Fisk v. Rickel*, 108 Iowa, 370; *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. R. 504; *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184; *Frost v. Standard Metal Co.*, 215 Ill. 240, affirming 116 Ill. App. 642.

25. *Guard v. Stevens*, 12 Mich. 292, 86 Am. D. 52. Followed in *Birdsall v. Heacock*, 32 Oh. St. 177, and *Fogel v. Blitz*, 128 Mich. 503.

cern as fast as the goods are sold" the guaranty was held non-continuing.²⁶

A letter addressed to a lumber merchant requesting him to "send my son-in-law the lumber he asks for, and it will be all right," was held not a continuing guaranty.²⁷

"In consideration of your agreeing to advance to W. & Co. not exceeding the sum of \$7,000 and interest, I hereby guaranty to you the repayment of the sums advanced," was held not a continuing guaranty.²⁸ And the following guaranty, viz.: "Messrs: The bearer, Mr. is visiting your city, buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guaranty," was held not a continuing guaranty.²⁹ A guaranty executed to wholesale merchants to secure credit for a bill of goods in the following language, viz.: "I hereby guaranty the payment of bills as they mature, purchased by F. S. M. of R. P. S. & Son . . . to the amount of thirteen hundred dollars," was held not a continuing guaranty.³⁰

26. *Baker v. Rand*, 13 Barb. (N. Y.) 152. See also, *Cutler v. Bal-lou*, 136 Mass. 337, 49 Am. R. 35.

27. *Birdsall v. Heacock*, 32 Oh. St. 177, 30 Am. Rep. 572.

28. *Frost & Co. v. Weathersbee*, 23 S. C. 354.

29. *Morgan v. Boyer*, 39 Oh. St. 324, 48 Am. R. 454.

30. *Smith et al. v. Van Wyck*, 40 Mo. App. 522. For other cases of guaranties held to be non-continuing, see *Brandt Sur. & Guar.* (3d Ed.), secs. 180 et seq.; *Kirby v. Marlborough*, 2 M. & S. 18; *Nicholson v. Paget*, 1 Cr. & M. 48; *Tayleur v. Wildin*, L. R. 3 Exch. 303; *Kay v. Groves*, 6 Bing. 276; *Bovill v. Turner*, 2 Chit. 205; *Melville v. Hayden*, 3 B. & Ald. 593; *Walker v. Hardman*, 4 Cl. & Fin. 258, H. L.; *Re Medewe's Trust*, 26 Beav. 588; *Atwood v. Crowdie*, 1 Stark 483; *Wood v. Priestner*, L. R. 2 Exch. 66; *Aldricks v. Higgins*, 16 S. & R. (Pa.) 212; *Bussier v. Chew*, 5 Phila. (Pa.) 70; *Boston, etc. Glass Co. v. Moore*, 119 Mass. 435; *White v. Reed*, 15 Conn. 457; *Congdon v. Reed*, 7 R. I. 406; *Sutherland v. Patterson*, 4 Ont. 565; *Sawyer v. Seen*, 27 S. Car. 251; *Perryman v. McCall*, 66 Ala. 402, 41 Am. R. 752; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38; *Bloom & Co. v. Kern*, 30 La. Ann. 1263; *Richardson School Fund v. Dean*, 130 Mass. 242; *Merchants & Farmers Bank v. Calmes*, 82 Miss. 603.

§ 101. **Guaranty Limited as to Amount or as to Amount of Credit to Principal.** Under a guaranty providing simply that the guarantor shall not be *liable* beyond a stated amount, or that he will be liable up to a stated amount, the guarantor is not relieved from his obligation to pay up to the amount or limit stipulated, from the fact merely that credit beyond that amount is extended to the principal. The guarantor is simply not liable for the excess.³¹ Clearly, however, the guarantor has a right to make his liability depend on credit not being extended to the principal beyond a stipulated amount, and if the language employed shows a plain intent to restrict it thus, the giving of credit beyond the amount specified has been held to relieve the guarantor from all liability.³² In most of the cases the fact that the guarantee specifies the amount or value or the aggregate value to be sold or advanced to the principal, or the aggregate amount to be sold him, is conclusive that the amount of credit to be extended the principal was not to exceed the sum named, and was to be a condition of the guarantor's liability, in the absence of language or circumstances showing a different intent.³³

§ 102. **Liability of Guarantor Under Renewal of Lease or Contract of Employment.** Questions sufficiently analogous to those just examined to warrant discussion here

31. *Rindge v. Judsen*, 24 N. Y. 64; *Powers v. Clark*, 127 N. Y. 417; *Conway v. Cunningham*, 6 S. Car. 351; *Platter v. Green*, 26 Kan. 252; *Sentinel Co. v. Smith*, 143 Wis. 377; *Frost v. Standard Metal Co.*, 215 Ill. 240, 116 Ill. App. 642; *Carson v. Hurst & Co.*, 137 Ga. 640, and authorities cited. Ante, sec. 98, and cases cited.

32. *Carson v. Hurst & Co.*, supra; *Historical Co. v. La Vague*, 64 Minn. 282; *Braetz v. Warner*, 1 Ky. L. 226; *Bloomington Mining Co. v. Searles*, 63 N. J. L. 47. In the case last cited the defendants guaranteed that if plaintiff would sell H. C. & Co. coal to the amount of \$900 they would be responsible for the coal so sold to the amount specified. The plaintiff sold H. C. & Co. coal to the amount of \$30,299 over \$2000 of which was unpaid. Held that the guarantors were under no liability whatever.

33. *Am. Bridge Co. v. Colonial Tr. Co.*, 215 Pa. St. 305; *Historical Co. v. La Vague*, supra, and other cases in the preceding note. Compare *Carson v. Hurst & Co.*, 137 Ga. 640.

have arisen under leases and contracts of employment containing provisions for renewal. If the contract of the surety in terms covers the original period of leasing or employment and "any renewal or renewals thereof," there is little difficulty in saying that the surety or guarantor is liable for the renewal term provided the character or conditions of the original letting or employment are not materially changed without his consent.³⁴ But where a lease for a definite term reserves to the tenant an option to renew, or a contract of employment for a definite time gives the employer a like privilege, but nothing further appears in the surety's contract or the contract secured from which an intention that the surety should be bound for the renewal term can reasonably be implied, the surety has usually been held not liable for rent accruing, or defaults committed, during the renewal term or period. The surety's consent to such liability cannot be presumed from the terms of the original contract to extend to what is practically a new contract or tenancy between the principal and the obligee.³⁵

§ 103. Revocation of Continuing Guaranty—Notice—Death. Unless a continuing guaranty for credits to be given or advances to be made from time to time in the future is upon consideration and is by its terms irrevoca-

34. See *U. S. v. Bailey*, 39 App. D. C. 105, 41 L. R. A. (N. S.) 422; *Tolman Co. v. Butt*, 116 Wis. 597.

35. *Tayleur v. Wildin*, L. R. 3 Exch. 303; *U. S. v. Bailey*, supra; *Brewer v. Thorp*, 35 Ala. 9; *Fasnacht v. Winkleman*, 21 La. Ann. 727; *Knouse v. Wise*, 76 N. J. L. 423; *Brewer v. Knapp*, 1 Pick. (Mass.) 332, distinguished in *Salisbury v. Hale*, 12 Pick. (Mass.) 416; *Gadsden v. Quackenbush*, 9 Rich. L. (S. Car.) 222; *Knowles v. Cuddeback*, 19 Hun (N. Y.) 590. Compare *Holme v. Brunskill*, L. R. 3 Q. B. D. 495. See also, *Allen v. Herman*, 3 Phila. 378; *Pleasanton's App.*, 75 Pa. 344. In *Woods v. Doherty*, 153 Mass. 558; *Rice v. Loomis*, 139 Mass. 302 and *Salisbury v. Hale*, supra, the surety was held liable for a renewal term upon what appeared to be a fair construction of the language employed. See also, *Hefferon v. Treber*, 21 S. Dak. 194, 130 Am. St. R. 711; *Shand v. McCloskey*, 27 Pa. Supr. Ct. 260. As tending to establish a rule different from that of the text see *Dufan v. Wright*, 25 Wend. (N. Y.) 636; *Cole v. Vodges*, 71 Pa. 383; *Deblois v. Earle*, 7 R. I. 26.

ble, the law implies a power in the guarantor to revoke it as to any subsequent transactions by notice to the creditor, even though no power of revocation is expressly reserved;³⁶ and it makes no difference that the instrument of guaranty is under seal,³⁷ or that some advances have already been made on the faith of it.³⁸ Furthermore, where the guarantee is thus revocable by notice, the death of the guarantor revokes the guaranty, at least from the time when the creditor has notice of it. But whether death is ipso facto a revocation, or the creditor must have notice of it, is the subject of conflicting decisions as will later appear.³⁹ Where the guarantee is expressly or impliedly to continue a definite time, however, as during the principal's term of office or employment, and is upon a consideration executed, it is not revoked by the death of the guarantor, nor is it revocable upon notice to the creditor or obligee, unless the contract so provides.⁴⁰

§ 104. Same—Fidelity and Guaranty Bonds—Special Terms as to Revocation upon Notice. The surety upon a corporate fidelity or contract bond, cannot by notice and without the consent of the obligee, and in the absence of fraud on his part, revoke it so as to relieve itself from liability for future defaults unless the bond so provides.⁴¹ But such bonds or policies frequently provide for cancellation upon a specified notice to the obligee and the return of unearned premiums, as in the case of most

36. See *Gay v. Ward*, 67 Conn. 147, 32 L. R. A. 818, and cases cited and discussed. *Lloyds v. Harper*, 16 Ch. Div. 290, 319.

37. *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. R. 305.

38. *Offord v. Davies*, 12 C. B. N. S. 748.

39. Post, sec. 201, and cases cited. See *Gay v. Ward*, supra, and cases cited; *Valentine v. Donahoe*, Kelley Banking Co., 133 Cal. 191, 195; *Hyland v. Habich*, 150 Mass. 112, 6 L. R. A. 383, 15 Am. St. R. 174.

40. *Pond v. U. S.* 111 Fed. Rep. 989; *Hecht v. Weaver*, 34 Fed. Rep. 111, and cases cited in the opinion and in 1 Brandt Sur. & Guar. (3rd Ed.), sec. 184; Post, secs. 201, 202, and cases cited and discussed.

41. See *U. S. Fid. & Guar. Co. v. First Nat. Bank*, 233 Ill. 475.

fire insurance policies. Such provisions are unquestionably valid.⁴²

§ 105. Absolute or Conditional Guaranty—Payment—Collection. An absolute guaranty is an undertaking by which the guarantor is bound unconditionally for the default of the principal, and under which he may be sued the moment the principal makes default without any steps on the part of the creditor other than are legally necessary to establish such default.⁴³

A conditional guaranty is one in which the guarantor's liability is dependent upon some additional steps on the part of the creditor against the principal or his estate, such as prosecuting him to judgment and execution,⁴⁴ or resorting to some specific security of the principal, or otherwise exercising due diligence against him without effect.

Guaranties of payment are the common example of the former class, while guaranties of collection are the most frequent examples of the latter.

A guaranty of collection is an undertaking by the guarantor that the debt guaranteed can be made out of the principal through the exercise of due diligence by the creditor.⁴⁵

§ 106. Same—What Guaranties Deemed Absolute and What Conditional Examples. As to what precise language will constitute an absolute as distinguished from a conditional guaranty the authorities are not agreed. It is generally settled, however, at least by the modern au-

42. See *Am. Surety Co. v. Thurber*, 60 N. Y. Supp. 198, 43 App. Div. 528, 162 N. Y. 244.

43. See Post, secs. 184 et seq. as to demand upon the principal and notice of default under an absolute guaranty. See also, *Hungerford v. O'Brien*, 37 Minn. 306, and cases cited; *Fall v. Youmans*, 67 Minn. 83, 64 Am. St. R. 390, 393, and note; *Roberts v. Hawkins*, 70 Mich. 566, and cases cited, and cases throughout the next section.

44. Post, sec. 107.

45. See 1 Brandt. Sur. & Guar. (3rd Ed.), secs. 111 et seq.; *Colby v. Farwell*, 71 N. H. 83; *French v. Marsh*, 29 Wis. 649. See cases throughout the next section.

thorities, that a guaranty "of payment at maturity" or "when due," or on a day certain, is absolute, and the guarantor is liable to suit by the creditor without any steps being taken by the latter against the principal, and usually without notice of the latter's default.⁴⁶ This is also the rule in most jurisdictions where the guaranty is simply of "payment" without qualifying words.⁴⁷ But

46. *Sylvester v. Downer*, 18 Vt. 32, 35; *Campbell v. Baker*, 46 Pa. St. 243; *Street v. Silver*, Brightley 96; *Mallory v. Lyman*, 3 Pin. (Wis.) 443. Compare *Sage v. Wilcox*, 6 Conn. 81 with *Breed v. Hillhouse*, 7 Conn. 528. "I guarantee the within at maturity" written on a promissory note has this effect. *Peck v. Frink*, 10 Ia. 193.

47. *Memphis v. Brown*, 20 Wall. (U. S.) 289; *Donly v. Camp*, 22 Ala. 659, 58 Am. D. 274; *Clay v. Edgerton*, 19 Oh. St. 549; *Jain v. Griffin*, 3 Colo. App. 90; *Williams v. Granger*, 4 Day (Conn.) 444; *Hooker v. Gooding*, 86 Ill. 60; *Metzger v. Hubbard*, 153 Ind. 189, and cases cited; *Star Wagon Co. v. Sweazy*, 63 Ia. 520; *Read v. Cutts*, 7 Greenl. (Me.) 186, 20 Am. D. 184; *Sanford v. Allen*, 1 Cush. (Mass.) 473; *Roberts v. Hawkins*, 70 Mich. 566; *Hungerford v. O'Brien*, 37 Minn. 306; *Osborne v. Gullikson*, 64 Minn. 218; *Wren v. Pearce*, 4 Sm. & M. 91; *Osborne v. Lawson*, 26 Mo. App. 549; *Bloom v. Warder*, 13 Neb. 476; *Morrison v. Citizens Nat. Bank*, 65 N. H. 263, 9 L. R. A. 282; *Brown v. Curtiss*, 2 N. Y. 226; *Jenkins v. Wilkinson*, 107 N. Car. 707, 22 Am. St. R. 911; *Foster v. Tolleson*, 13 Rich. (S. Car.) 31; *Klein v. Kern*, 94 Tenn. 34; *Bull v. Bliss*, 30 Vt. 127; *Ten Eyck v. Brown*, 3 Pin. (Wis.) 452. See *Evans v. Bell*, 45 Tex. 553; *Leonhart v. Citizens Bank*, 56 Neb. 38. "I guarantee the payment and collection of the within note with costs if any made," was held a guarantee of payment or collection at the option of the holder, who might sue the maker and hold the guarantor for costs if he failed to make the debt from the principal. *Tuton v. Thayer*, 47 How. Pr. (N. Y.) 394. Compare *Farrow v. Respass*, 11 Ired. L. (N. Car.) 170; *Benton v. Gibson*, 1 Hill L. (S. Car.) 56; *Craig v. Phipps*, 23 Miss. 240. One other than the payee who endorses a non-negotiable note or other non-negotiable security, is in some states a guarantor of collection, *prima facie* at least. *Kearns v. Montgomery*, 4 W. Va. 29. In others he is a maker, or absolute guarantor in the nature of a surety and not entitled to notice or due diligence by the holder against parties primarily bound. *Cromwell v. Hewett*, 40 N. Y. 491, 100 Am. D. 527, reviewing the cases. *Houghton v. Ely*, 26 Wis. 181, 7 Am. R. 52-n. In Pennsylvania, it seems that a mere guarantee of payment as distinguished from a guarantee of payment or performance at a particular time, or "when due," or of faithful performance, is in effect a guaranty of collection. See *Mezner v. Spier*, 96 Pa. St. 533; *Hartman v. Lancaster First Nat. Bank*, 103 Pa. St. 581; *Zahn v. Lancaster First Nat. Bank*, 103 Pa. St. 576. See, also, *Gamage v. Hutchins*, 23 Me. 565; *Piedmont Guano, etc. Co. v. Morris*, 86 Va. 941.

where the guaranty was of the "ultimate payment," it was held to be conditional only,⁴⁸ and the guaranty of payment of a note at the insolvency of the drawers was held to require reasonable diligence of the creditor;⁴⁹ and so of an undertaking "to be liable only in the second instance,"⁵⁰ or "to pay if the creditor will endeavor to collect."⁵¹ A guaranty of "payment by foreclosure and sale" is not absolute, but requires diligent recourse to the securities with reference to which it is given.⁵² A guaranty that a demand is "good and collectible,"⁵³ or simply "good,"⁵⁴ "or good until paid,"⁵⁵ or merely collectible, is a conditional guaranty requiring due diligence of the creditor.

But a guarantee that a note is good as gold has been held a guarantee of payment.⁵⁶ And so of the following on a non-negotiable note: "I guarantee the within at maturity."⁵⁷

But an agreement by which the assignor of a quantity of notes and accounts guaranteed, represented and

48. *Ely v. Bibb*, 4 J. J. Marsh. (Ky.) 71; *Walker v. Forbes*, 25 Ala. 139, 60 Am. D. 498. So where the guarantor agreed to be answerable for final payment. *Huntress v. Patten*, 20 Me. 28.

49. *Graham v. Bradley*, 5 Humph. (Tenn.) 476.

50. *Pittman v. Chisholm*, 43 Ga. 442.

51. *Phoenix Co. v. Louisville, etc. Co.*, 8 Fed. 142.

52. *Vanderbilt v. Schreyer*, 91 N. Y. 392. See also, *McMurray v. Noyes*, 72 N. Y. 523, 28 Am. R. 180, where it was held that an undertaking to pay if a deficiency should arise in case of foreclosure and sale, was construed to require foreclosure with due diligence, and that a delay to do so for fourteen months, during ten months of which the property was ample security, until it was destroyed by fire released the guarantor. See also, *Boncke v. Louttit*, 104 Cal. 230; *Walker v. Goldsmith*, 7 Oreg. 183.

53. *Sylvester v. Downer*, 18 Vt. 32, 35.

54. *Curtis v. Smallman*, 14 Wend. (N. Y.) 231; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Cowles v. Peck*, 55 Conn. 251, 3 Am. St. R. 44, 46, and authorities cited.

55. *Cowles v. Peck*, supra. "Good and collectible until paid." *Lemon v. Strong*, 55 Conn. 443, 446.

56. *Taylor v. Soper*, 53 Mich. 96. "Just as good as if I would give you the money—I will insure it as good as gold and silver," held a guarantee of payment. *Koch v. Malhorn*, 25 Pa. 89, 64 Am. D. 685.

57. *Peck v. Frink*, 10 Ia. 193, 74 Am. D. 384.

warranted that a specified sum should be realized thereon, and which provided that the assignees should use due diligence in their collections, was held to be a conditional guaranty, and the assignees, in order to recover thereon, were bound to show that each note and account had been put in judgment and execution thereon returned unsatisfied.⁵⁸

§ 107. What Constitutes Due Diligence Where Guarantee is of Collection—In General—Insolvency of Principal. But what constitutes due diligence, or the evidence of it? In the absence of special circumstances, the courts agree that it signifies the prompt prosecution of an action against the principal debtor to judgment followed by the prompt issue of execution and a return *nulla bona*;⁵⁹ and one line of authorities requires this much, at least, even though the creditor is prepared to show that the principal is insolvent, or the securities for the debt are worthless.⁶⁰ These cases go upon their own peculiar construction of such guaranties deeming it an implication from the terms of the contract that the creditor shall, as a condition precedent to the guarantor's liability, proceed to judgment and execution against the principal.⁶¹ By the apparent weight of authority, however, while the creditor's failure to so prosecute the principal is *prima facie* a non compliance with the terms or condition of the contract, he is nevertheless entitled to show that prosecution of the debtor or of the securities would be a vain and idle thing owing to the utter in-

58. *Clark v. Kellogg*, 96 Mich. 171.

59. *Colby v. Farwell*, *supra*, and cases cited, and note to *Fall v. Youmans* in 64 Am. St. Rep. 393.

60. *Craig v. Parkis*, 40 N. Y. 181, 100 Am. D. 469; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371; *Bosman v. Akeley*, 39 Mich. 710, 33 Am. R. 447; *Clark v. Kellogg*, 96 Mich. 171; *French v. Marsh*, 29 Wis. 649; *Getty v. Schantz*, 101 Wis. 229; *McNail v. Burrow*, 33 Kan. 495; *Roberts v. Laughlin*, 4 N. Dak. 167.

61. See *French v. Marsh*, *supra*, and cases cited, with which compare *Brackets v. Rich*, 23 Minn. 485, 23 Am. R. 703.

solvency of the one or the worthlessness of the other.⁶² If, however, the creditor knows of some special means whereby the debt can be made, which a prudent creditor would employ under like circumstances, as by proceedings by attachment or garnishment⁶³ he should resort to them; and if the creditor knows of property of the principal, liable to execution, it is his duty to inform the sheriff, if the latter cannot discover it without his aid;⁶⁴ and when the creditor relies upon the insolvency of the principal, as an excuse for not suing him, where that excuse is permitted, he must, it seems, be prepared to show such "utter insolvency that an action would be fruitless."⁶⁵

62. *McClurg v. Fryer*, 15 Pa. 293; *Colby v. Farwell*, 71 N. H. 83; *Camden v. Doremus*, 3 How. (U. S.) 515, 533; *Huntress v. Patten*, 20 Me. 28; *Gillighan v. Boardman*, 29 Me. 79, 82; *Dana v. Conant*, 30 Vt. 246; *Sanford v. Allen*, 1 Cush. (Mass.) 473; *Bull v. Bliss*, 30 Vt. 127; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103, 111, 112; *McDoal v. Yeomans*, 8 Watts (Pa.) 361; *Jones v. Ashford*, 79 N. C. 172; *Cahuzak v. Samine*, 29 Ala. 288; *Stone v. Rockefeller*, 29 Ohio St. 625; *Brackett v. Rich*, supra; *Perkins v. Catlin*, 26 Conn. 437; *Durand v. Bowen*, 73 Ia. 573; *Dewey v. Clark Investment Co.*, 48 Minn. 130, 31 Am. St. R. 623; *Fall v. Youmans*, 67 Minn. 83, 64 Am. St. R. 390; *Dillman v. Nadelhoffer*, 160 Ill. 125, and cases cited infra, note 65.

63. See *Forest v. Stewart*, 14 Oh. St. 246; *Beach v. Bates*, 12 Vt. 68. Where the creditor neglected to present the principal's check for seven days and the principal's funds in bank were appropriated in the meantime, the guarantor was held discharged. *Fegley v. McDonald*, 89 Pa. St. 128.

64. *Höffman v. Bechtel*, 52 Pa. St. 194. See also, *Fall v. Youmans*, 67 Minn. 83, 64 Am. St. Rep. 390. The creditor of an insolvent corporation is not bound to resort to the stockholders before coming upon the guarantor. *Mut. Assn. v. Lichtenwalner*, 100 Pa. St. 100, 45 Am. R. 359.

65. *Brackett v. Rich*, 23 Minn. 485, 23 Am. R. 703; *Camden v. Doremus*, 3 How. (U. S.) 115, quoting *Lamberton v. Windom*, 18 Minn. 506, 515, and numerous other cases. See also, *Perkins v. Catlin*, 11 Conn. 213, 29 Am. D. 282-n; *Allen v. Rundle*, 50 Conn. 9; *Lemmon v. Strong*, 55 Conn. 443; *Pittman v. Chisholm*, 43 Ga. 442; *Dillman v. Nadelhoffer*, 160 Ill. 121; *Peck v. Frink*, 10 Iowa, 193, 74 Am. D. 384; *Durand v. Bowen*, 73 Iowa 573; *Huntress v. Patten*, 20 Me. 28; *Lewis v. Hoblitzell*, 6 Gill. & J. (Md.) 259; *Sanford v. Allen*, 1 Cush. (Mass.) 473; *Jones v. Ashford*, 79 N. Car. 172; *Stone v. Rockefeller*, 29 Oh. St. 625; *McDoal v. Yeomans*, 8 Watts (Pa.) 361; *McClurg v. Foyer*,

§ 108. Must Creditors Exhaust Collaterals? It has been held that the creditor is not bound to foreclose a mortgage taken of the principal prior to the guarantee of the collection of the note secured by it, or to otherwise pursue credits and securities by collateral or unusual remedies unless he has specially agreed to do so.⁶⁶ But there are decisions to the contrary which apparently treat the question as one purely of intention, deeming it reasonable to assume that the guarantor of the collection of a debt thus secured at the time the guaranty is given contemplates the exhaustion of the security as a condition of his liability for the debt or a deficiency thereof.⁶⁷ If the guarantor became bound before the security was taken, and there was at the time he signed no agreement that it should be taken, there is doubtless no obligation to resort to foreclosure or other collateral and unusual remedies before suing him. It is enough that ordinary legal remedies are exhausted.

§ 109. Same—Time and Place of Bringing and Prosecuting Suit. The time within which suit must be brought against the principal debtor in order to constitute due diligence as against the guarantor is not the subject of any absolute or arbitrary rule.⁶⁸

Generally, however, suit must be brought at the next regular term of court following the debtor's default and prosecuted to judgment and execution as promptly as

15 Pa. 293; *Janes v. Scott*, 59 Pa. 178, 98 Am. D. 328; *Nat. Ass'n v. Lichtenwalner*, 100 Pa. 100, 45 Am. R. 359; *Jones v. Greenlaw*, 6 Cold. (Tenn.) 342; *Cates v. Kittrell*, 7 Heisk. (Tenn.) 606; *Tex. Co. v. Griswold* (Texas Civil Appeals, 1900), 41 S. W. 513; *Wheeler v. Lewis*, 11 Vt. 265; *Bull v. Bliss*, 30 Vt. 127.

66. *Day v. Elmore*, 4 Wis. 190.

67. *Johnson v. Shepard*, 35 Mich. 115; *Barman v. Carhartt*, 10 Mich. 338; *Dewey v. Investment Co.*, 48 Minn. 130, 31 Am. St. R. 623. See also, *Deering v. Russell*, 5 N. Dak. 319; *Briggs v. Norris*, 67 Mich. 325; *Ege v. Barnitz*, 8 Pa. St. 304. Ante, sec. 106 and cases cited in note 52.

68. *Getty v. Schantz*, 101 Wis. 229. See *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371, as to whether and when the question of diligence is one of law or of fact.

the ordinary practice and rules of court will permit.⁶⁹ The creditor, however, is not bound to follow the principal who has removed into another state and sue him there,⁷⁰ though he must avail himself of any remedy he may have within the state, as by proceedings under the absent debtor's act.⁷¹

§ 110. Notice to Guarantor of Collection. After due diligence employed against the principal has failed to make the debt, reasonable notice of that fact to the guarantor of collection is usually required, though failure in this respect will not release him unless he is prejudiced by the omission or delay.⁷² No notice of the principal's mere default seems necessary.⁷³

§ 111. Waiver of Diligence by Guarantor. Whatever language or conduct of the guarantor induces the creditor to refrain from taking the usual steps constituting due diligence against the principal, will excuse their omission. But it has been held that a subsequent new

69. 1 Brandt on Sur. (3rd Ed.), sec. 114; Voorhies v. Atlee, 29 Ia. 49; Day v. Elmore, 4 Wis. 190; Durand v. Bowen, 73 Ia. 573; Jones v. Ashford, 79 N. Car. 172; Roberts v. Masters, 40 Ind. 461; Graham v. Bradley, 5 Humph. (Tenn.) 476. See also, Clark v. Merriam, 25 Conn. 576; Craig v. Parkis, 40 N. Y. 181, 100 Am. D. 469; Moakley v. Riggs, 19 Johns. (N. Y.), 69, 10 Am. D. 196.

70. White v. Case, 13 Wend. (N. Y.) 543; Barber v. Bell, 77 Ill. 490; Bard v. McElroy, 6 B. Monr. (Ky.) 416; Fall v. Youmans, 67 Minn. 83, 64 Am. St. R. 390.

71. White v. Case, *supra*; Mosier v. Wafel, 56 Barb. (N. Y.) 180.

The burden of showing that the principal left property in the state in such cases is upon the guarantor. Fall v. Youmans, *supra*.

If the maker of a note resided out of the state when the guarantee was given, and continues to reside there, the creditor must pursue him at his residence. Burt v. Horner, 5 Barb. (N. Y.) 501. Compare Clayton v. Coburn, 42 Conn. 348.

72. Gillighan v. Boardman, 29 Me. 79; Thomas v. Woods, 4 Cow. (N. Y.) 173; Bashford v. Shaw, 4 Oh. St. 263; Sylvester v. Downer, 18 Vt. 32; Brackett v. Rich, 23 Minn. 485, 23 Am. R. 703. See also, Becker v. Saunders, 28 N. Car. 380, (6 Ired. 380); Grice v. Ricks, 14 N. Car. 62; Lewis v. Brewster, 2 McLean (U. S.) 21. Compare Foster v. Barney, 3 Vt. 60.

73. Forest v. Stewart, 14 Oh. St. 246; Brackett v. Rich, *supra*.

promise made with knowledge of the omission will not bind the guarantor.⁷⁴

74. *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547. *Contra*, *Ashford v. Robinson*, 8 Ired. (N. Car.) 114; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553. Compare *Turkman v. Duncan*, 1 Grant. (Pa.) 228.

CHAPTER X.

NEGOTIABILITY AND ASSIGNABILITY OF CONTRACTS OF SURETYSHIP AND GUARANTY. THIRD PERSONS AS BENEFICIARIES.

§ 112. **Negotiability of Contracts of Guaranty and Suretyship—In General.** One who is bound as a technical surety upon a negotiable instrument, being a co-maker or co-acceptor and bound with the principal by the same contract and upon the same terms, is of course liable to a holder thereof in due course, pursuant to the familiar rules of the law merchant.¹

A guaranty however is a separate and independent undertaking, and whether, though written upon a negotiable instrument, it is itself negotiable in the full sense of the law merchant, so as to enable the transferee to sue upon such guarantee in his own name, unaffected by equities existing between such guarantor and his immediate promisee, has given rise to much discussion and to no little conflict and confusion in the adjudged cases.

The law of this subject may perhaps be most conveniently treated under the following heads:

1. Where the guaranty is made contemporaneously with the execution of the instrument guaranteed;
2. Where the guaranty is executed at the time and as a part of its subsequent transfer.
3. Where it is written on a separate paper though the guaranty is of a negotiable instrument.

It has been argued with much ability that even though a guaranty of a negotiable instrument be written upon a separate paper, it should itself be deemed negotiable though it contains no negotiable words,² but it may

1. *Palmer v. Grant*, 4 Conn. 389; *White v. Howland*, 9 Mass. 314, 6 Am. D. 71. See also, *Killian v. Ashley*, 24 Ark. 511, 91 Am. D. 519.

2. See the dissenting opinion of Senator Verplanck in *McLaren v. Watson's Exrs.*, 26 Wend. (N. Y.) 432.

be deemed settled beyond controversy that it is not.³ Furthermore, by the weight of authority, a guaranty of a negotiable instrument made contemporaneously with the instrument is not negotiable, even though written upon such instrument itself, and no holder save the first can maintain an action thereon in his own name in the absence of statute permitting it,⁴ and subsequent transferees of the instrument are subject to be met in the enforcement of the guaranty by whatever equities are available as between the guarantor and the original payee,⁵ unless the guaranty itself is negotiable in terms. Most of these cases proceed upon the ground that a guaranty is the separate undertaking of the guarantor and that, unlike the instrument upon which it is written, it is a contract of the common law rather than of the law merchant. Where, however, the guaranty is absolute and unconditional, and is itself negotiable in terms, it will doubtless be deemed negotiable by law.⁶

A number of cases hold that a guaranty of a negotiable instrument made contemporaneously therewith is negotiable in like manner with the instrument upon which it is written, even though it contains no negotiable words, in the sense that the holder thereof may sue upon it in his own name.⁷ There is but little judicial authority,

3. *Barlow v. Meyers*, 64 N. Y. 45.

4. *Lamorieux v. Hewit*, 5 Wend. (N. Y.) 307; *True v. Fuller* 21 Pick. (Mass.) 140; *Edgerly v. Lawson*, 176 Mass. 551, 51 L. R. A. 432, commented on in 14 Harv. L. Rev. 299; *McDoal v. Yeomans*, 8 Watts (Pa.) 361; *Irish v. Cutter*, 31 Me. 536; *Tyler v. Binney*, 7 Miss. 479; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. D. 306.

5. *Central Trust Co. v. Bank*, 101 U. S. 68; *Barlow v. Myers*, 64 N. Y. 41; *Gallagher v. White*, 31 Barb. (N. Y.) 92; *Everson v. Gere*, 122 N. Y. 290; *Hayden v. Weldon*, 43 N. J. L. 128, 39 Am. R. 551; *Briggs v. Latham*, 36 Kan. 205; *Dubuque First Nat. Bank v. Carpenter*, 41 Ia. 518; *Phelps v. Church*, 65 Mich. 231. In *Briggs v. Latham*, supra the guaranty was written upon the mortgage securing a negotiable note.

6. *Louisville, etc. Co. v. Louisville Trust Co.*, 174 U. S. 552; *McLaren v. Watson's Exrs.*, 26 Wend. (N. Y.) 430; *Kitchell v. Burns*, 24 Wend. (N. Y.) 456.

7. *Donnerberg v. Oppenheimer*, 15 Wash. 200; *Webster v. Cobb*, 17 Ill. 459; see also *Holm v. Jamieson*, 173 Ill. 295, 45 L. R. A. 846;

however, to the effect that equities of defense existing between the guarantor and original payee of the instrument are cut off by such transfer in favor of a subsequent holder in due course. To so hold would of course be to accord to the guaranty itself full negotiability in the strict commercial sense.⁸

Where a guaranty of payment is written upon a negotiable instrument by the transferrer at the time of transfer, there are still more cogent reasons for holding it negotiable than where it is made at the inception of the instrument, and it has been said by some courts that such a guaranty, if absolute and unconditional, is virtually an indorsement with enlarged liability, or, in other words, an indorsement with a waiver of the strict demand and notice required by the law merchant in the case of an ordinary indorsement, and is itself negotiable.⁹

Killian v. Ashley, 24 Ark. 511, 91 Am. D. 519; Hopson v. Spring Co., 50 Conn. 597; Ellsworth v. Harmon, 101 Ill. 275.

8. To the effect that a contemporaneous guaranty, absolute in terms, is negotiable in the sense that subsequent transfer gives full rights thereunder to a transferee of the negotiable instrument on which it is written, see Commercial Bank v. Cheshire Provident Institution, 59 Kan. 361, 41 L. R. A. 175, 68 Am. St. R. 368; Webster v. Cobb, 17 Ill. 466; Phelps v. Church, 65 Mich. 232. Judge Story supports this view on the ground of business convenience and the presumed intention of the parties (Story on Bills, sec. 458), while Prof. Parsons maintains the contrary (Notes and Bills, 133, 134), on the ground that it is an innovation upon the law merchant, and that all the benefits to be derived from treating a guaranty as negotiable can be attained through the law and practice of indorsement. See also, 2 Daniel Neg. Inst., sec. 1777 et seq.

It may be suggested that in states where this question is *res integra* the uniform Negotiable Instruments Law would have a bearing, and may perhaps be decisive against negotiability unless the guaranty is itself negotiable in terms.

9. Partridge v. Davis, 20 Vt. 500; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. R. 811; Lemmert v. Guthrie Bros., 69 Neb. 499, 111 Am. St. R. 561, 62 L. R. A. 954, holding that waiver of "demand and notice of protest," under such a guaranty is a waiver of the right to strict notice as an indorser, but not of reasonable notice as a guarantor.

It has been held that the signing by the payees of a note of a guaranty of payment combined with an express waiver of demand, notice, and protest constitutes the signers indorsers and not guarantors,

But this doctrine has been refused recognition in the federal supreme court,¹⁰ and in the courts of a number of states, on the ground that a guaranty is not an indorsement of the law merchant¹¹ though it may operate as an assignment, and there is much authority to the effect that such a guaranty is equivalent to an indorsement for the purpose of passing the legal title to the paper so as to enable the transferee or subsequent holders to recover against prior parties to the paper free from equities of defense.¹²

§ 113. Assignment of Contracts of Guaranty and Suretyship. As a technical surety is bound with his principal upon the same contract and for the same thing, if the contract of the principal, though not negotiable, is nevertheless assignable by the rules of law as to assignability, its assignment carries with it the liability of both principal and surety. Whether a technical guaranty, not negotiable in terms, is nevertheless assignable in the ordinary sense, is a question not wholly free from difficulty. It seems certain, however, that when the right of action

and, where no indorsee is named, the subsequent delivery of the instrument to one who takes in due course and for value passes title. *Voss v. Chamberlain*, 139 Ia. 569, citing *German Am. Sav. Bank v. Hanna*, 124 Ia. 374. See also, *Myrick v. Hasey*, 27 Me. 2; *Dunham v. Peterson*, 5 N. Dak. 414, 36 L. R. A. 232. See also *Leahy v. Haworth*, 141 Fed. 850 construing Nebraska Statute.

10. *Central Trust Co. v. First Nat. Bank*, 101 U. S. 70; *Omaha Nat. Bank v. Walker*, 2 McCrary (U. S.) 565, 5 Fed. R. 399.

11. *Belcher v. Smith*, 7 Cush. (Mass.) 482; *True v. Filler*, 21 Cush. (Mass.) 140; *Tuttle v. Bartholomew*, 12 Met. (Mass.) 452; *Up-ham v. Prince*, 12 Mass. 14; *Snevely v. Ekel*, 1 Watts & S. (Pa.) 203; *Lamourieux v. Hewitt*, 5 Wend. (N. Y.) 307. See *Crosby v. Roub*, 16 Wis. 645.

12. *Dunham v. Peterson*, 5 N. Dak. 414, 36 L. R. A. 232, citing *State Nat. Bank v. Hayden*, 14 Neb. 480; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. R. 811; *Buck v. Davenport Sav. Bank*, 29 Neb. 407; *Helmer v. Com'l Bank*, 28 Neb. 474; *Partridge v. Davis*, 20 Vt. 449; *Vanzant v. Arnold*, 31 Ga. 310; *Judson v. Gorkin*, 37 Ill. 286; *Heaton v. Halbert*, 4 Ill. 489; *Childs v. Davidson*, 58 Ill. 437; *Phelps v. Sargent*, 19 Minn. 119. See also, *Phelps v. Church*, 65 Mich. 221, decided under statute.

against either a technical surety or guarantor has once arisen, it may, like other chose in action, be assigned.¹³

By the weight of authority also, a guaranty is assignable even before a cause of action thereon has become complete, if the contract guaranteed is itself assignable as not being personal in its character, and can be enforced by the same person who can enforce the principal obligation,¹⁴ unless it manifests a plain intent to restrict the guarantor's liability to the original creditor.¹⁵ Furthermore, whatever operates as an assignment of the debt will operate, *prima facie* at least, as an assignment of the guaranty, on the theory that it is, like a mortgage, an incident thereof, so that whoever may enforce the debt may enforce the guarantee;¹⁶ and this was held even

13. *Everson v. Gere*, 122 N. Y. 290; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. R. 204. Doubtless the assignment of the cause of action under a guaranty after the cause of action has accrued can not be restricted even by the express terms of the contract.

14. *Colebrooke Collateral Securities*, sec. 253; *Ellsworth v. Harmon*, 101 Ill. 274; *Barlow v. Myers*, 64 N. Y. 41; *Clafin v. Ostrom*, 54 N. Y. 581; *Stillman v. Northrup*, 109 N. Y. 475; *Everson v. Gere*, 122 N. Y. 290; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. D. 469; *Lemmon v. Strong*, 59 Conn. 448, 21 Am. St. R. 123; *Arents v. Commonwealth*, 18 Gratt. (Va.) 768; *Metzger v. Hubbard*, 153 Ind. 189, and cases cited; *Levy v. Cohen*, 92 N. Y. Supp. 1074, 103 App. Div. 195, reversing 91 N. Y. Supp. 594, 45 Misc. 95. See *Potter v. Gronbeck*, 117 Ill. 404; *Brumm v. Gilbert*, 64 N. Y. Supp. 144, 50 App. Div. 430.

15. *Smith v. Starr*, 4 Hun (N. Y.) 125, (guarantee "to the present owner and holder"); *Evansville Nat. Bank v. Kaufman*, 93 N. Y. 273, 45 Am. R. 204. Compare *First Nat. Bank of Dubuque v. Carpenter*, 41 Ia. 518. See *Tideout Sav. Bank v. Libbey*, 101 Wis. 193, and authorities cited. See also, *Van Deveer v. Wright*, 6 Barb. (N. Y.) 547, as to a guarantee of collection. If the guaranty is upon a negotiable note, the transfer of the note is *prima facie* an assignment of the guaranty thereon even in states where a guaranty of a negotiable instrument is non-negotiable. *Harbord v. Cooper*, 43 Minn. 466; *Phelps v. Sargent*, 69 Minn. 118; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Everson v. Gere*, 122 N. Y. 290; *Arents v. Commonwealth*, *supra*. But it may be shown that it was not the intention that the liability of the guarantor should pass by the transfer of the note. *Gallagher v. White*, 31 Barb. (N. Y.) 92.

16. *Stillman v. Northrup*, 109 N. Y. 473; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. D. 469; *Tideout Sav. Bank v. Libbey*, *supra*; *Arents*

though the assignee may have been ignorant of the guaranty when he acquired the debt.¹⁷

§ 114. Assignment of Surety Bonds. After the liability of the surety company has been fixed thereon, its bond or the damages due thereunder is no doubt assignable. Before breach however, the question of its assignability is much more doubtful. It has been held that a bond to secure the faithful performance of a building contract is assignable without the consent of the company even before breach.¹⁸ It would seem, however, that such contracts are so far in the nature of insurance, and the risk of such a character and the personal supervision of the beneficiary so material, that a contrary holding would be more just, and a number of authorities support this view.¹⁹ Such bonds often contain express provisions against assignment.

§ 115. Third Parties as Beneficiaries of Suretyship Contract. It sometimes happens that a contract of suretyship is sought to be enforced by parties other than those between whom it was directly made, most frequently the under bonds given to secure the performance of contracts for the erection of buildings or for other particular works. Whether a laborer or material man may maintain an action thereon ordinarily depends (1) upon whether, in the particular jurisdiction, a contract between two parties for the benefit of a third who is not a party to it may be enforced by the latter, and, (2) upon whether the contract between the surety and the owner may be regarded as having been made for the benefit of the plaintiffs.

v. Commonwealth, *supra*; Wheeler v. Glenn, 6 Ky. L. (abstract) 289; Alger v. Alger, 80 N. Y. Supp. 523, 83 App. Div. 168.

17. Tideout Sav. Bank v. Libbey, *supra*.

18. Am. Bonding & Tr. Co. v. Ry. Co., 124 Fed. 866; Zane v. City Tr. Co., 117 Fed. 817; Coyles v. U. S. Fid. & Guaranty Co., 32 Wash.

20. See U. S. v. Merc. Tr. Co., 213 Pa. St. 411

19. See Frost Guar. Ins. (2nd Ed.), sec. 177 and cases cited; Foltz v. Tradesman's Trust Co., 201 Pa. 583; Citizens Tr. Co. v. Howell, 19 Pa. Sup. Ct. 258.

In most states the first question is answered in the affirmative.²⁰

The second question is frequently difficult to answer, and may or may not be affected by statute. In the latter case it is practically a matter of construction. In view of the numerous and sometimes contradictory rulings on this question it must be enough to say that while a mere undertaking in the contract secured, or in the contract of the surety, that the contractor will furnish all labor and materials or that he will deliver the completed structure free from liens or claims for labor or materials, will not give to workmen or materialmen a right to sue where the bond does not run to them, they may usually sue where the bond or other contract of the surety expressly states that it is for their benefit or protection, or the language of the bond, or of the contract which it secures, makes it the duty of the principal or the principal and surety to pay, or to pay and discharge, all claims for labor and materials.²¹

§ 116. Same—Surety Bonds as Substitutes for Mechanics' Liens. Ordinary mechanics' liens do not apply to public works and special lien laws are seldom passed for the benefit of those furnishing labor and material in their prosecution.²² In view of this, statutes frequently require of contractors for public works, a bond with prescribed conditions for the protection of laborers and materialmen, a usual condition being in effect that he will promptly pay for all labor and material used in performing the contract. Such a bond is construed liberally in

20. See *Tweeddale v. Tweeddale*, 116 Wis. 517, and cases cited and note to *Smith v. Bowman*, 9 L. R. A. (N. S.) 889, and standard works on contracts.

21. See on this entire subject the elaborate and extended note to *Knight & Jillson Co. v. Castle*, in 27 L. R. A. (N. S.) 575; *Warren Webster & Co. v. Beaumont Hotel Co.*, 151 Wis. 1, and cases cited; *Connor Co. v. Aetna Indemnity Co.*, 136 Wis. 13. See Post, sec. 188, as to notice of default. *Knight & Jillson Co. v. Castle*, supra.

22. See *Knapp v. Swancy*, 56 Mich. 345, 56 Am. R. 397; *Connor Co. v. Aetna Indemnity Co.*, 136 Wis. 13.

the light of the obvious purpose of the act under which it is required and given, which is not merely to protect the obligee named in the bond but to afford a substitute for the ordinary mechanics' lien, and to give to laborers and materialmen a claim upon the bond in lieu of a claim upon the building.²³ The right of material men to recover on bonds so given and conditioned is unquestioned,²⁴ and any changes made in the bond by consent of the contractor and the government or public, without the consent of the surety, will not release the latter from liability to persons who supply labor and material thereunder.²⁵

23. *Hill v. Am. Sur. Co.*, 200 U. S. 197; *U. S. ex rel. Vermont Marble Co. v. Bengdorf*, 113 App. D. C. 506; *Kansas City Hydraulic Press Brick Co. v. Nat. Sur. Co.*, 149 Fed. 507; *King v. Downey*, 24 Ind. App. 262; *Wilson v. Whitmore*, '92 Hun 466, 36 N. Y. Supp. 693, affirmed in 157 N. Y. 693. See also the notes to *Knight & Jillson Co. v. Castle*, *supra*, and to *Griffith v. Rundle*, 23 Wash. 453, in 55 L. R. A. 381.

24. See cases above and *Connor Co. v. Aetna Indemnity Co.*, 136 Wis. 13; *Anniston Pipe & Foundry Co. v. Nat. Sur. Co.*, 34 C. C. A. 526, 32 Fed. 549.

25. *Anniston Pipe & Foundry Co. v. Nat. Sur. Co.*, *supra*; *Post*, sec. 221, and cases cited; *Griffith v. Rundle*, *supra*, and cases cited.

CHAPTER XL

SURETY'S RIGHT TO REIMBURSEMENT OR INDEMNITY.

§ 117. **Nature and Origin of the Right.** One who, or whose property stands in a suretyship relation towards another is entitled, ordinarily, if he pays the debt, discharges the obligation or answers for the default of the principal, or his property is taken or applied for that purpose, to reimbursement from the latter.¹ Indeed this right of reimbursement or indemnification has sometimes been made the very basis of judicial definition of a surety.² It is sometimes spoken of as the surety's *equity* to reimbursement or indemnity, and properly so, for it seems to have been originally enforceable solely in equity;³ and though enforceable at law since Lord Mansfield's time upon the basis of a promise implied by law from the inherent equity of the situation and the presumed intention of the parties,⁴ it is in no wise dependent for its existence upon a contract or promise in the strict sense, but rests both in courts of chancery and of common law upon substantially the same obvious principles of justice.⁵ Furthermore, as we shall presently see, the surety is commonly entitled, at least upon payment of the whole debt, to be equitably substituted to all the

1. O'Carrol's Case, 1 Amb. 61; Glossup v. Harrison, 3 V. & B. 134; Cowp. temp. Eld. 61; Tinsley v. Oliver, 5 Munf. (Va.) 419; Decker v. Pope, 1 Selw. N. P. (13th Ed.) 91; Ritenour v. Mathews, 42 Ind. 7, and cases throughout this chapter.

2. Ante, sec. 1; Wendlandt v. Sohre, 37 Minn. 162; Smith v. Sheldon, 35 Mich. 42, 24 Am. R. 529. As to the right of criminal bail to indemnity, however, see Post, sec. 311.

3. Toussaint v. Martinnant, 2 Term. R. 100, 105.

4. Decker v. Pope, 1 Selw. N. P. (13th Ed.), 91; Appleton v. Bascomb, 3 Met. (Mass.) 169; 1 Brandt Guar. & Sur. (3rd Ed.), sec. 229; 2 Harv. L. Rev. 59.

5. Bisp. Eq. (8th Ed.), sec. 331; Pownal v. Ferrand, 6 Barn. & C. 439; Hunt v. Amidon, 4 Hill (N. Y.) 345, 40 Am. Dec. 283; Frevert v. Henry, 14 Nev. 191.

rights, remedies, priorities and securities held of the principal debtor to enforce this right of reimbursement or indemnification.⁶

§ 118. Surety Claiming Reimbursement Must Sign at Principal's Request. But in order to claim reimbursement of his principal, it is generally held that the surety must become such at the express or implied request of the former, otherwise he will be deemed a mere volunteer under the rule that one who, without authority, intermeddles with the affairs of another even by paying his debts, cannot thus make himself the creditor of him whose debt he pays⁷.

§ 119. When Surety's Right to Indemnity Arises. The surety's right to indemnity is deemed to arise the instant he becomes liable as surety, and from that moment his principal becomes bound for his reimbursement, if the surety is compelled to pay or perform. In a general sense and for many purposes, he is a creditor of the prin-

6. Post, chap. XII.

7. Post, secs. 138, 139; *Carter v. Black*, 4 Dev. & B. Law (N. Car.) 425; *Hill v. Wright*, 23 Ark. 530; *White v. White*, 30 Vt. 338; *McPherson v. Meek*, 30 Mo. 345; *Teberg v. Swenson*, 32 Kan. 224; *Ricketson v. Giles*, 91 Ill. 154; *Gray v. Bowls*, 18 N. Car. 437. Compare *Hamilton v. Johnson*, 82 Ill. 39. Contra, *Hall v. Smith*, 5 How. (U. S.) 96, as to surety of a surety. The indorser of commercial paper may, of course, recover without proof of a request from any prior party. *Pownall v. Ferrand*, 6 B. & C. 439. Similar conflict in the authorities naturally exist as to the right of a surety who has signed without request, and has paid, to be subrogated to the securities of the principal in the hands of the creditor. See Post, sec. 139. Ordinary fidelity and contract bonds are commonly signed at the request or solicitation of the risk, who almost invariably joins with the company as principal in its execution. The effect of either or both of these circumstances is to give the company a legal right of indemnification by him; and the language of the bond itself is commonly conclusive of the matter. See *Rice v. Fid. & Dep. Co.*, 103 Fed. 427, 43 C. C. A. 270; *Frost Guar. Ins.* (2nd Ed.), chap. XXIII. See also, Post, sec. 132, as to evidence of the fact and amount of the risks liability to indemnify. As to the effect of waiver of defenses by the company, see Post, sec. 139.

principal from that moment,⁸ though he can sue the principal at law for indemnity only after he has paid or performed,⁹ unless the principal has expressly covenanted with the surety to pay at a time certain, or has expressly undertaken to save him harmless from liability.¹⁰ Upon this principle obligations incurred¹¹ or property conveyed by the principal to the surety as security for his contingent liability are incurred or conveyed upon sufficient consideration, both as against the principal and his creditors;¹² and the surety may, after payment, have fraudulent conveyances by his principal set aside, though they were made before payment or maturity of the debt,¹³ and may object to the constitutionality of such exemption or other laws passed after his liability as surety is incurred, but before payment, as materially impair his remedy against his principal.¹⁴ Similar principles apply between co-sureties as to the right to contribution.¹⁵ Furthermore, as a consequence of the principal's duty to indem-

8. *Rice v. Southgate*, 16 Gray (Mass.) 142; *Sargent v. Salmond*, 27 Me. 539; *Barney v. Glover*, 28 Vt. 391; *Kahn v. Bledsoe*, 22 Okla. 666, 132 Am. St. R. 665; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Griffin v. Long*, 96 Ark. 268, and note thereto in *Am. Ann. Cas.* 1912. B. 622.

9. Post, sec. 122.

10. Post, sec. 131.

11. *Haseltine v. Guild*, 11 N. H. 390.

12. *Pennington v. Woodall*, 17 Ala. 685; *Ripley v. Severance*, 6 Pick. (Mass.) 474, 17 Am. D. 397; *Rogers v. Abbott*, 128 Mass. 102; *Wallis v. Cooper*, 24 Miss. 208. See *Wiswall v. Potts*, 58 N. Car. 184.

13. *Taylor v. Heriot*, 4 Desaus Ch. (S. Car.) 227; *Sargent v. Salmond*, 27 Me. 539; *Smith v. Pitts*, 167 Ala. 461; *Keel v. Larkin*, 72 Ala. 493; *Griffin v. Long*, 96 Ark. 258, *Ann. Cas.* (1912 B.) 622; *Williams v. Banks*, 11 Md. 198, 242; *Loughridge v. Bowland*, 52 Miss. 546; *Pennington v. Seal*, 49 Miss. 518; *Hamet v. Dundass*, 4 Pa. St. 178; *Baily's Est.*, 156 Pa. 634, 22 L. R. A. 444; *Hatfield v. Merod*, 82 Ill. 113; *Choteau v. Jones*, 11 Ill. 300, 50 Am. D. 460; *Ellis v. Southwestern Land Co.*, 108 Wis. 313, 81 Am. St. R. 909; *Mugge v. Ewing*, 54 Ill. 236; *Nash v. Burchard*, 87 Mich. 85; *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. D. 420; *Bragg v. Patterson*, 85 Ala. 233. But see *Greene v. Slarnes*, 87 Tenn. 582, decided under statute, and holding that the surety may, before payment, have a fraudulent conveyance set aside. See also, *Stump v. Rogers*, 1 Oh. 263.

14. *Keel v. Larkin*, 72 Ala. 493.

15. See Post, sec. 154.

nify and exonerate the surety, a principal who buys at execution sale against the surety will be treated in equity as a trustee for the surety and the purchase price will be deemed a payment on the debt *pro tanto*.¹⁶

In spite of what has been said, however, as to the surety's implied right of indemnification, it is competent for the principal and surety to enter into whatever express contract they will touching the reimbursement of the latter. The surety may contract for more than strict indemnity, or may bargain away his right to indemnity entirely, though stipulations claimed to have the latter effect will be strictly construed in his favor.¹⁷

§ 120. Parties to Actions for Reimbursement—Co-sureties. Where two or more co-sureties pay jointly or from funds raised on their joint credit their action for reimbursement is joint, otherwise they must sue severally,¹⁸

16. *Perry v. Yarborough*, 3 Jones Eq. (N. Car.) 66; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. R. 613; *Madgett v. Fleenor*, 90 Ind. 517. The surety, however, being under no duty or obligation to the principal, may bid in his property at a sale on execution for the debt. *Carlos v. Ansley*, 8 Ala. 900; *Horsefield v. Cost*, Addis (Pa.) 152.

17. *Thomas v. Liebke*, 81 Mo. 675. No right of indemnity on favor of a surety is implied as against one who has expressly undertaken to indemnify the principal against the same obligation. *Crafts v. Tritton*, 8 Taunt. 365.

18. *Appleton v. Bascomb*, 3 Met. (Mass.) 169, citing *Osborne v. Harper*, 5 East 224; *Pearson v. Parker*, 3 N. H. 366; *Jewett v. Cornforth*, 3 Me. 107; *Hudson v. Aman*, 158 N. Car. 429, 431, and cases cited. See to the same effect, *Clapp v. Rice*, 15 Gray (Mass.) 557, 77 Am. D. 387; *Dusol v. Bruguiere*, 50 Cal. 456. See also, *Whitbeck v. Ramsay's Est.*, 74 Ill. App. 524; *McCole v. Beattie*, 51 Vt. 265. Compare *Gould v. Gould*, 8 Cow. (N. W.) 168; *Kilby v. Skel*, 5 Esp. 194. A surety who pays jointly with another, however, may sue alone at law for contribution such of his co-sureties as have not paid, *Atkinson v. Thayer*, 2 B. Monr. (Ky.) 348; *Hill v. Myers*, 90 Ga. 674. See also, *Furman v. Furman*, 115 Md. 437.

But the paying sureties may join for contribution in equity. *Smith v. Rumsey*, 33 Mich. 183; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98; *Young v. Lyons*, 8 Gill (Md.) 162; *Hudson v. Aman*, *supra*. A surety may assign his claim for indemnity and the assignee may sue in the name of the surety, or his own name if the principal promises to pay him, or in his own name under the codes. See *DeBerry v. Withers*, 44 Pa. 356; *Compton v. Jones*, 4 Cow. (N. Y.) 13.

and where the surety has taken a bond of indemnity from his principal, it has been held that his remedy is solely on the bond, pursuant to the rule that an express contract excludes an implied one covering the same matter.¹⁹

§ 121. Same—Indemnity by Joint Principals—Surety for One of Several Principals. A surety for two or more joint principals is entitled to sue them jointly for indemnity,²⁰ and it is immaterial that judgment had been rendered against one of the principals only.²¹ But it seems that the surety is not bound to sue them jointly even though they are jointly bound to the principal, but may recover full indemnity from any one of them, for each principal being liable for the whole debt the surety's payment has relieved each from liability for the whole.²²

But it has been laid down that a surety for one of several co-obligors for the same debt cannot recover indemnity from the other co-obligors. Thus, where joint obligors are sued and one of them is arrested and gives bail, the bail can not, upon being compelled to pay as such, maintain an action against the other joint obligor for money paid to his use, for there is no privity between the bail of the one obligor and his co-obligor.²³ So one

19. *Toussaint v. Martinnant*, 2 Durn. & East 100.

20. *Babcock v. Hubbard*, 2 Conn. 536; *Dessar v. King*, 110 Ind. 69.

21. *Badeley v. Consolidated Bank*, 34 Ch. D. 536; *Inbusch v. Farwell*, 1 Black (U. S.) 566; *Purviance v. Sutherland*, 2 Oh. St. 478. But see *Reeves v. Isenhour*, 59 Ind. 478.

22. *Apgar v. Hiler*, 24 N. J. L. 812; *Clay v. Severance*, 55 Vt. 300; *Duncan v. Kiefer*, 3 Bin. (Pa.) 126. It makes no difference with this rule that the default was the personal act of a co-principal other than the defendant unless the surety connived at it. *Overton v. Woodson*, 17 Mo. 453; *Albro v. Robinson*, 93 Ky. 195; *Tighe v. Morrison*, 116 N. Y. 263, 5 L. R. A. 617-n.

23. *Osborn v. Cunningham*, 4 Dev. & B. (N. C.) 423. In *Yoder v. Briggs*, 3 Bibb. (Ky.) 228, a joint judgment having been recovered against A and B, one who signed a replevin bond as surety for A, and paid the joint judgment against A and B, was not allowed to maintain an assumpsit for money paid against B, who was in fact a surety

who became bail for one partner in a suit against all the partners brought after dissolution of the firm, was denied a recovery against the co-partners of his principal.²⁴ But where the surety, before dissolution, becomes bound for the obligation of one partner which is really a debt of the firm, he has been held entitled to reimbursement from the other partners.²⁵

§ 122. When the Surety's Action for Reimbursement or Indemnity Accrues. In the absence of express contract, the surety's right to indemnity matures and is directly enforceable at law only when he has paid or discharged, in whole or in part, the debt or obligation of his principal.²⁶ But it seems that the surety may, in good faith and with due regard to the interests of his principal, compromise and discharge the debt before it

of A. See also, *Elmendorph v. Tappen*, 5 Johns. (N. Y.) 176. In *Knox v. Vallandigham*, 21 Miss. 527, a judgment was obtained against the principal and two sureties on a note. One who executed a forthcoming bond as surety for one of the two sureties and paid the judgment, was denied contribution in equity against the other surety. But see contra, *Stout v. Vanse*, 1 Rob. (Va.) 169.

24. *Bowman v. Blodgett*, 2 Met. (Mass.) 308.

25. *Burns v. Parish*, 3 B. Mon. (Ky.) 8; *Donegan v. Moran*, 53 Hun (N. Y.) 21, 5 N. Y. Suppl. 575; *Wharton v. Woodburn*, 20 N. Car. 507, (bond); *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188; *Purviance v. Sutherland*, 2 Oh. St. 478. Contra, *Asbury v. Fleisher*, 11 Mo. 611, (note); *Tom v. Goodrich*, 2 Johns. (N. Y.) 213, (bond); *Krafts v. Creighton*, 3 Rich. L. (S. C.) 273, (bond).

26. *Brandt Sur. & Guar.* (3rd Ed.), secs. 227, 228; *Brental v. Helms*, 1 Root (Conn.) 291, 1 Am. D. 44-n; *Hodges v. Armstrong*, 3 Dev. (N. Car.) 253; *Lane v. Westmoreland*, 79 Ala. 372; *Barth v. Graf*, 101 Wis. 27, 38, and authorities cited; *Dennison v. Soper*, 33 Ia. 183; *Ingalls v. Dennett*, 6 Greenl. (Me.) 79; *Vermule v. York Cliffs Improvement Co.*, 105 Me. 350, 134 Am. St. R. 553, 557, and note; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57. See also, *Bullard v. Brown*, 74 Vt. 120. But he may, before payment, sue a third party on a note which he holds as collateral. *Klein v. Funk*, 82 Minn. 3. No demand upon the principal or notice to him need precede the surety's action. His cause of action arises the moment he has paid. *Odlin v. Greenleaf*, 3 N. H. 270; *Williams Adm'rs v. Williams Admr's*, 5 Oh. 444. *Ward v. Henry*, 5 Conn. 595, 13 Am. D. 119 and note; *Collins v. Boyd*, 14 Ala. 505.

is due. He may then sue the principal for indemnity when it matures, but not before.²⁷

Unlike the right or equity of subrogation,²⁸ the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable, and he may pay by installments and recover each installment from the principal in a separate suit as for money paid. Nor is this a violation of the rule against splitting causes of action, for the cause of action in each suit arises out of the damage caused the surety by making the payment, and not out of the creditor's right to sue the principal for the entire demand,²⁹ and the Statute of Limitations runs against his right to reimbursement for any installment from the time of payment and not from the time he became bound as surety or the principal made default.³⁰

Where the debt paid is secured by a sealed instrument, the surety is ordinarily treated as subrogated to the rights of the creditor thereunder and stands as a bond creditor of the principal with respect to the statute of limitations, and this is true, at least in equity,

27. *Craig v. Craig*, 5 Rawle (Pa.) 91; *Golsen v. Brand*, 75 Ill. 148; *Dennison v. Soper*, supra; *Tillotson v. Rose*, 11 Met. (Mass.) 299; *Ross v. Menefee*, 125 Ind. 432; *White v. Miller*, 47 Ind. 385. After maturity the amount so paid will be a legal set off against the principal. *Jackson v. Adamson*, 7 Blackf. (Ind.) 597.

28. Post, sec. 136.

29. *Pownal v. Ferrand*, 6 B. & C. 439, 13 E. C. L. 203; *Bullock v. Campbell*, 9 Gill. (Md.) 182; *Williams Admr. v. Williams Admr.*, 5 Oh. 444; *Pickett v. Bates*, 3 La. Ann. 627; *Hall v. Hall*, 10 Humph. (Tenn.) 352. This rule applies to an indorser of commercial paper against maker or acceptor in an action for money paid. *Pownal v. Ferrand*, supra.

30. *Davies v. Humphries*, 6 M. & W. 153; *Thayer v. Daniels*, 110 Mass. 345; *Harrah v. Jacobs*, 75 Ia. 72. When the surety has paid by installments part inside and part outside the statutory period, he can recover the former but not the latter as against a plea of the statute. *Davies v. Humphries*, supra; *Arbogast v. Hayes*, 98 Ind. 26. See *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411n. Compare *Williams v. Williams*, 5 Oh. 444.

though the instrument paid was executed by the principal and surety jointly;³¹ and similarly he will be deemed a judgment creditor where the debt paid has been reduced to judgment.³²

§ 123. Payment in Spite of Principal's Defenses.

Though the principal may have a valid defense to an action by the creditor, if the surety, after maturity of the debt, discharges it in good faith without knowledge of such defense, he will be entitled to reimbursement,³³ unless, indeed, the defense arises out of the infancy, coverture or other personal incapacity of the principal, whether actually known to the surety or not.³⁴ But generally no action for indemnity lies where the surety pays with knowledge or notice of a defense available to his

31. Post, sec. 140 et seq.; *Smith v. Swan*, 7 Rich. Eq. (S. Car.) 112; *Morrison v. Paige*, 9 Dana (Ky.) 428; *Hull v. Myers*, 90 Ga. 674, 682, 683 and authorities cited; *Partee v. Matthews*, 53 Miss. 140; *Kinnard v. Baird*, 20 S. Car. 377; *Sublett v. McKinney*, 19 Tex. 438. Compare *Joyce v. Joyce*, 1 Bush (Ky.) 474. See Post, sec. 124, note 41.

32. *Morrison v. Paige*, supra; *Neal v. Nash*, 23 Oh. St. 483; *Peters v. McWilliams*, 36 Oh. St. 155. Contra, *Junker v. Rush*, 136 Ill. 179, 11 L. R. A. 183; *Allegheny Co. v. Dickey*, 131 Pa. 86. See Post, sec. 124, note 41; Post, sec. 140, note 57.

33. *Warner v. Morrison*, 3 Allen (Mass.) 566; *Cave v. Burns*, 6 Ala. 780; *Casquet v. Oakley*, 19 La. 76.

In *Frith v. Sprague*, 14 Mass. 455, the principal's obligation was void for want of consideration but the surety paying without knowledge of the defense was held entitled to indemnity.

In *Stinson v. Brennan*, Cheves Law (S. Car.) 15, the consideration for the principal's undertaking had failed but the surety recovered. So where there was usury, *Hyde v. Miller*, 60 N. Y. (Supp.) 974; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. D. 631. And where the sureties paid the amount of an alleged shortage in their principal's presence and with his consent, he was held estopped to deny such shortage when sued for reimbursement. *Rizer v. Callen*, 27 Kan. 339.

34. See *Davis v. Board*, 72 N. Car. 441, 74 Id. 374; *Ayres v. Burns*, 87 Ind. 245, 44 Am. R. 759. In this last case a surety on an infant's note for necessities was not permitted to recover indemnity on an action thereon. His remedy it was intimated was by action for the value of the necessities supplied. Compare *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746.

principal,³⁵ or after satisfaction by him, or an absolute release of the debt.³⁶

But though the contract of the principal is valid and enforceable, the surety cannot recover indemnity if his own contract is illegal or founded upon an illegal or immoral consideration;³⁷ and this has been held though he was compelled to pay by process of law in another jurisdiction than that whose law was violated and where reimbursement was sought.³⁸

§ 124. Same—Statute of Limitations. The surety's right to reimbursement becomes enforceable by action only when he has paid the whole or some part of the debt for which he is bound, and the statute of limitations begins to run against his right to recover the sum paid from the date of such payment.³⁹ It has therefore been held that a surety who pays even after the claim against the principal has been barred, is entitled to indemnity against his principal, at least where he could not himself have interposed the statute as a defense had

35. *Whitehead v. Peck*, 1 Ga. 140; *Craven v. Freeman*, 82 N. Car. 361; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. D. 631; *Davis v. Bauer*, 41 Oh. St. 257. Where the surety has interposed a defense available to the principal, however, but has lost his case notwithstanding his diligence in making use of it he may have indemnity though such defense probably ought to have prevailed. *Montgomery v. Russell*, 10 La. 330. Compare *Riley v. Stallworth*, 56 Ala. 481. As to the effect of judgment against the surety, see Post, sec. 255. As to fraud on the principal by the creditor, see Ante, sec. 56.

36. See *Brown v. Kidd*, 34 Miss. 291 to the effect that a levy upon the principal's property is prima facie satisfaction of the debt. See as to release, absolute and qualified, Post, secs. 240, 242.

37. Where part of the consideration upon which bondsmen sign for a public officer is that he shall deposit public funds in a bank belonging to them, they are bound thereon but cannot have indemnity from the principal. *Ramsay v. Whitbeck*, 183 Ill. 550.

38. *Harley v. Stapleton*, 24 Mo. 248, (a gambling debt).

39. Ante, sec. 119; *Davies v. Humphreys*, 6 M. & W.; *Angrove v. Tippet*, 11 L. T. (N. S.) 708; *Poe v. Dixon*, 60 Oh. St. 124, 71 Am. St. R. 713; *Lowenthal v. Coonan*, 135 Cal. 381, 87 Am. St. R. 113; *Thayer v. Daniels*, 110 Mass. 345; *Godfrey v. Rice*, 59 Me. 308; *Burrus v. Cook*, 215 Mo. 496, 505, and cases cited; *Scott v. Nichols*, 27 Miss. 94, 61 Am. D. 503, 505, and note.

he been sued by the creditor.⁴⁰ Whether the statute runs against the paying surety as a simple contract creditor or as a bond or judgment creditor, would seem at first blush to depend upon whether he is deemed subrogated to the rights of the original creditor under a bond or judgment paid by him. The decisions on this point, however, are conflicting, regardless of whether the surety is deemed ipso facto subrogated, is seeking subrogation in equity, or has an assignment of the security paid.⁴¹

§ 125. Bankruptcy of Principal. The effect of the bankruptcy of the principal upon the right of the surety to reimbursement is stated in another place.⁴²

40. *McBoon v. Governor*, 6 Port. (Ala.) 32; *Hooks v. Branch Bank*, 8 Ala. 580; *Reid v. Flippen*, 47 Ga. 273 (qualifying *Turner v. McCarter*, 42 Ga. 491); *Geiseke v. Johnson*, 115 Ind. 308; *Walker v. Lathrop*, 6 Iowa 516; *Brought v. Griffith*, 16 Iowa 26; *Reed v. Humphrey*, 69 Kan. 155; *Godfrey v. Rice*, 59 Me. 308; *Hall v. Cresswell*, 12 Gill & J. (Md.) 36; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Reeves v. Pulliam*, 9 Baxt. (Tenn.) 153; *Bernsback v. Reiner*, 8 Minn. 59; *Scott v. Nichols*, 27 Miss. 94, 61 Am. D. 503-505, and note; *Miller v. Woodward*, 8 Mo. 169; *Silbey v. McAllister*, 8 N. H. 389; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Morton v. Hall*, 41 Vt. 471; *Faires v. Crockrell*, 88 Tex. 428, 28 L. R. A. 528. Contra where the claim was barred as to both principal and surety. *Hanchett v. Pegram*, 21 La. Ann. 722. Contra where the claim was barred as to the principal only. *Auchampaugh v. Schmidt*, 70 Ia. 642, 59 Am. R. 459; *State v. Blake*, 2 Oh. St. 147; *Dorsey v. Wayman*, 6 Gill. (Md.) 59. See *Stone v. Hammell*, 83 Cal. 549.

41. Post, sec. 140, note 57. For a very extended and able presentation of the view that the limitation period applicable to actions of implied assumpsit must govern in enforcing subrogation, or securities to which the surety has become subrogated, See *Burrus v. Cook*, 215 Mo. 496, reversing *Burrus v. Cook*, 117 Mo. App. 386, and in the dissenting opinion of Ellison, J. in the case last cited. See also, *Junker v. Rush*, 136 Ill. 179, 11 L. R. A. 183; *Faires v. Cockrell*, supra (overruling *Sublett v. McKinney*, 19 Tex. 439); *Kreider v. Isenbice*, 123 Ind. 10; *Chipman v. Morrill*, 20 Cal. 130; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411-n; *Allegheny Co. v. Dickey*, 131 Pa. 86, and cases cited; *Joyce v. Joyce*, 1 Bush. (Ky.) 474. As sustaining a contrary view, see *Hopewell v. Kerr*, 9 Ind. App. 11; *Lilly v. Dunn*, 96 Ind. 220; *Hull v. Myers*, 90 Ga. 674, 684; *Smith v. Swain*, 7 Rich. Eq. (S. Car.) 112; *Sparks v. Childers*, 21 Ind. Terr. 187, and cases cited Ante, note 32; *Northwestern Nat. Bank v. Opera House Co.*, 23 Mont. 1 (under statute); Ante, sec. 122 and cases cited in note 31.

42. Post, sec. 196.

§ 126. **Failure of Surety to Interpose His Own Defenses.** How far the surety's failure to interpose his own personal defenses affects his right to indemnity from the principal is not altogether certain. Generally he may pay in spite of them and recover indemnity without being met by the defense that he is a mere volunteer. If the principal is bound it seems that the surety may pay and have indemnity though his guaranty is unenforceable under the Statute of Frauds;⁴³ nor, does his failure to plead the statute of limitations bar his right where it has run against him and not against his principal.⁴⁴ It has been held, however, that an accommodation drawer, released by want of demand and notice of dishonor, cannot recover in implied assumpsit against his principal (the acceptor) for part payment on the bill, unless he paid at the request of the acceptor, though he might have paid the entire amount of the bill and sued the acceptor as such on the footing of a purchaser.⁴⁵ A surety who paid with knowledge of a material alteration for which he might have claimed his release was held entitled to reimbursement from those who remained bound,⁴⁶ and where the guarantor might claim his release, because of want of notice of the principal's default, or otherwise on account of the creditor's want of diligence in taking steps legally required for the protection of the guarantor, the latter may waive his defense, pay the debt and hold the principal for indemnity.

§ 127. **Amount Recoverable by Surety Under His Right to Indemnity.** The object of a surety's contract is not

43. *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Beal v. Brown*, 13 Allen (Mass.) 114; *Lee v. Stowe*, 57 Tex. 444. See also, *Ames v. Jackson*, 115 Mass. 508; *Simpson v. Hall*, 47 Conn. 417.

44. *Shaw v. Loud*, 12 Mass. 447; *McClatchie v. Durham*, 44 Mich. 235; *Hollinsbee v. Ritchie*, 49 Ind. 261. But see *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Dawson v. Lee*, 83 Ky. 49. See also, *Norton v. Hall*, 41 Vt. 471.

45. *Sleigh v. Sleigh*, 5 Exch. 514. See also, *Stanley v. McElrath*, 86 Cal. 449, 10 L. R. A. 545; *Fowler v. Strickland*, 107 Mass. 552.

46. *Houck v. Graham*, 106 Ind. 195.

profit to him beyond the premium or compensation, if any, in return for which he becomes bound. Its object is the indemnity of the creditor so far as the latter chooses to insist upon it, and a surety or guarantor who has discharged the debt of his principal is entitled to be reimbursed by the latter to the extent only of what such discharge actually cost him. He cannot speculate upon his liability, and by discharging the debt for less than its face, recover the balance from the principal in the absence of special agreement with the latter.⁴⁷ So, if the surety pays in depreciated currency or bank notes, he is entitled only to the value of such currency or notes at the time of payment,⁴⁸ and if he pays in property, he can recover its value merely.⁴⁹

The surety who compounds with the creditor cannot, even by taking an assignment of the debt, recover more than the compromise cost him. It is his duty to make the best terms he can for his principal, and in so doing he acts as his agent, and may not speculate at his expense.⁵⁰ But the fact that the surety who pays the debt,

47. 1 Brandt Sur. & Guar. (3rd Ed.), sec. 233; *Ex parte Rushforth*, 10 Ves. 420; *Reed v. Norris*, 2 M. & C. 361; *Martindale v. Brock*, 41 Md. 571; *Delaware, etc. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Bonney v. Seeley*, 2 Wend. (N. Y.) 481; *Matthews v. Hall*, 21 W. Va. 510; *Geiske v. Johnson*, 115 Ind. 308; *Coggeshall v. Ruggles*, 62 Ill. 401; *Martin v. Ellerbe's Admr.*, 70 Ala. 326; *Child v. Eureka Powder Works*, 44 N. H. 354, and cases throughout this section. This is likewise the principle of the civil law. *Succession of Dinkgrave*, 31 La. Ann. 703. For similar principles with respect to contribution between co-sureties, see *Post*, sec. 156.

48. *Feamster v. Withrow*, 9 W. Va. 296, 12 W. Va. 611; *Owings v. Owings*, 3 J. J. Marsh (Ky.) 590; *Succession of Dinkgrave*, *supra*; *Southall v. Farish*, 85 Va. 403, 1 L. R. A. 641.

49. *Bonney v. Seeley*, 2 Wend. (N. Y.) 481; *Jordan v. Adams*, 7 Ark. 348; *Feamster v. Withrow*, 12 W. Va. 611; *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Succession of Dinkgrave*, 13 La. Ann. 703. Where the property of the surety given in payment exceeded in value the amount of the debt, the latter, and not the value of such property, was the measure of his indemnity. *Hickman v. McCurdy*, 7 J. J. Marsh (Ky.) 555.

50. *Reed v. Norris*, 2 Mylne & C. 361; *Price v. Horton*, 4 Tex. Civ. App. 526; *Southall v. Farish*, 85 Va. 403, 1 L. R. A. 641; *Coggeshall v. Ruggles*, 62 Ill. 401. But in *Blow v. Maynard*, 2 Leigh (Va.) 29.

afterward receives a part of it from a so-surety in virtue of his right of contribution will not prevent him from recovering the entire sum paid from the principal; he simply holds so much of his recovery as was paid by his co-surety as trustee for the latter.⁵¹

§ 128. Same—Interest, Costs and Damages. The surety who has paid his principal's debt is entitled to interest on the amount paid, from the time of payment, and to any costs actually incurred by him in making a prudent and reasonable defense against the creditor's claim.⁵² But he cannot recover attorneys fees or costs of collection not actually incurred, merely because the principal contract provides for them, unless such provision is made for his benefit.⁵³ Neither can he recover of the principal such damages as are indirect, remote or consequential unless they were within the contemplation of both parties when the obligation was entered into. Thus, he cannot recover for embarrassment to his business;⁵⁴ or for trouble and harm, as where he was taken in exe-

it is said that there is nothing in the relation of principal and surety that will prevent the surety from buying the claim against the principal, and taking an assignment of it and holding it for the full amount, the same as a stranger might. That an accommodation indorser of commercial paper may buy it up at a discount and enforce it against the maker for the full amount, see *Stanley v. McElrath*, 86 Cal. 449, 10 L. R. A. 545; *Fowler v. Strickland*, 107 Mass. 552.

51. *Strong v. Blanchhard*, 4 Allen (Mass.) 538.

52. *Whitworth v. Tilman*, 40 Miss. 76; *Hulett v. Soullard*, 26 Vt. 295; *Backus v. Coyne*, 45 Mich. 584; *Bright v. Lennon*, 83 N. Car. 183; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Cleveland v. Covington*, 3 Stroub (S. C.) 184; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635-n; *Marsh v. Harrington*, 18 Vt. 150; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Downer v. Baxter*, 30 Vt. 467; *Bennett v. Dowling*, 22 Tex. 660; *Cranmer v. McSwords*, 26 W. Va. 412. If the surety knows the creditor's claim to be just he has no right to contest it and burden the principal with the costs of contest, but only with the costs of a default. *Holmes v. Weed*, 24 Barb. (N. Y.) 546; *Beckley v. Munson*, 22 Conn. 299. Similarly in actions for contribution, see Post, sec. 156; *Briggs v. Boyd*, 37 Vt. 534.

53. *Gleske v. Johnson*, 115 Ind. 308.

54. *Hayden v. Cabot*, 17 Mass. 169. See also, 2 Suth. on Dam. (2nd Ed.), sec. 753.

cution for the debt;⁵⁵ or for the damages due to the fact that in order to meet the demand of the creditor he was compelled to sell his property at a sacrifice,⁵⁶ or for the costs incident to the levy of an execution upon his property in the absence of express agreement, for he is supposed to have the means of paying a judgment against him without process of execution.⁵⁷

§ 129. Set-Off as Affecting the Right to Reimbursement—Insolvency of Principal—Retention of Funds—When Action by Principal Against Surety Will be Stayed. After payment by the surety the general principles of the law of set-off apply as between the claim of the surety to reimbursement and any independent claim of the principal against the surety. But the surety cannot, before payment, retain funds in his hands belonging to his solvent principal or set up his suretyship liability in an action by such principal.⁵⁸ If, however, a surety is sued by his principal upon a demand in favor of such principal and an action is also brought by the creditor under the suretyship contract, the surety may, if his principal be insolvent, have a temporary injunction against his principal's action, under the older prac-

55. *Powell v. Smith*, 8 Johns (N. Y.) 249.

56. *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130.

57. *Pierce v. Williams*, 23 L. J. Exch. 322; *Knight v. Hughes*, M. & M. 247, 3 C. & P. 467; *John v. Jones*, 16 Ala. 454; *Beckley v. Munson*, 22 Conn. 299; *Newcomb v. Gibson*, 127 Mass. 396, 399; *Emery v. Vinall*, 26 Me. 295; *Boardman v. Paige*, 11 N. H. 431; *Stothoff v. Dunham*, 4 Harr. (N. J.) 181; *Wynn v. Brooke*, 5 Rawle (Pa.) 106; *Robinson v. Sherman*, 2 Gratt. (Va.) 178, 44 Am. D. 381. Contra, *Hulett v. Soullard*, 26 Vt. 295; *Briggs v. Boyd*, 37 Vt. 541; *McKee v. Campbell*, 27 Mich. 497. See *Kemp v. Finden*, 12 M. & W. 421 and cases cited. Post, sec. 156 in notes 68, 69, 70. Where the action was against the principal and surety jointly, however, it has been held that the surety can recover costs incident to an execution against his property, on the ground that he has a right to expect that the principal or his property will satisfy the judgment. *Appgar's Admr. v. Hiler*, 4 Zab. (24 N. J. L.) 812.

58. *Tyree v. Parham*, 66 Ala. 424; *Ingalls v. Dennett*, 6 Me. 79; *Williams v. Helme*, 1 Dev. Eq. (N. Car.) 151, 18 Am. D. 580. See *Beaver v. Beaver*, 23 Pa. St. 167. Compare *Walker v. McKay*, 2 Met. (Ky.) 294.

tice, until his liability as surety is determined.* If the determination is against his liability as surety the injunction will be dissolved, but if it is established, and he discharges it to an amount equal to the principal's claim the injunction will be made permanent; if it is less the injunction will be modified. Under the reformed procedure, an order staying proceedings in such cases until the right of the surety to reimbursement is determined and he has an opportunity to set it up by amended or supplemental pleadings, serves the same purpose as an injunction under the older practice.⁵⁹

§ 130. What Constitutes Payment—Surety's Own Bill or Note. Generally, whatever it is agreed between the surety and the creditor shall extinguish the debt, will constitute, when given, such payment as will entitle the surety to indemnity. Thus, where the creditor released the principal upon receipt of a mortgage on the surety's property, the surety was held entitled to recover indemnity of the principal before paying the mortgage.⁶⁰

Even though he gives his own bill or note, if it is accepted by the creditor as full satisfaction of the debt, his right to indemnity is, by the apparent weight of authority, complete, though he has not paid such bill or note, and he may sue the principal as for money paid to his use.⁶¹ The ground of most of these decisions seems

59. *Richardson v. Merritt*, 74 Minn. 354, and authorities cited. See also *Sims v. Wallace*, 6 B. Mon. (Ky.) 410; *Abbey v. Van Campen*, Freem. Ch. (Miss.) 273; *Williams v. Helme*, 1 Dev. Eq. (N. Car.) 151; 18 Am. D. 580; *Battle v. Hart*, 2 Dev. Eq. (N. Car.) 31; *Walker v. Dicks*, 80 N. Car. 263; *Scott v. Timberlake*, 83 N. Car. 382; *Ross v. McKinney*, 2 Rawle, (Pa.) 227; *Beaver v. Beaver*, 23 Pa. 167; *Feazle v. Dillard*, 5 Leigh. (Va.) 30; *Mattingly v. Sutton*, 19 W. Va. 19 and cases cited. In this last case it was held that an insolvent principal can not in equity collect a debt which his surety owes him without indemnifying the latter against his suretyship liability. If judgment has been obtained on such a claim against the surety its collection will be enjoined until security is given.

60. *McVicar v. Royce*, 17 Up. Can. (Q. B.) 529.

61. *Barclay v. Gooch*, 2 Esp. N. P. 571; *Rodgers v. Maw*, 15 M. & W. 445, 449; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Doolittle v. Dwight*, 2 Met. (Mass.) 561; *Owen v. McGehee*, 61 Ala. 440; *Bone v.*

to be that the principal is as much benefited by this form of discharge as if the surety had actually paid in money.⁶² A number of authorities hold, however, that the surety cannot recover indemnity where he has given his own note in payment of the debt secured unless such note has been paid,⁶³ and the English decisions support the same view where the surety gives his own bond or non-negotiable note in discharge of his principal's obligation.⁶⁴ On the whole the view that the surety who gives his own note or bond should not be entitled to indemnity until he pays it seems most consonant with reason and justice, unless, perhaps, the rule that the surety can recover indemnity before payment be confined to cases where he has given a negotiable instrument;⁶⁵ and the learned editor of the last edition of Brandt on Suretyship and Guaranty regards the rule that gives the surety who has paid by his own note or obligation a right to recover the whole amount of the debt discharged as

Torrey, 16 Ark. 83; Mims v. McDowell, 4 Ga. 182; Nixon v. Beard, 111 Ind. 137; Pearson v. Parker, 3 N. H. 366; Witherby v. Mann, 11 Johns. (N. Y.) 518; Auerbach v. Rogin, 83 N. Y. Supp. 154, 40 Misc. 695; Howe v. Buffalo Co., 37 N. Y. 297; Rizer v. Callen, 27 Kan. 339; Stubbins v. Mitchell, 82 Ky. 538; Marysville Telephone Co. v. First Nat. Bank, 143 Ky. 578; Sapp v. Arken, 68 Ia. 699; Peters v. Barnhill, 1 Hill Law (S. Car.) 237; Bauschman v. Credit Guarantee Co., 47 Minn. 377; Stanley v. McElrath, 86 Cal. 449, 10 L. R. A. 545; McCole v. Beatty, 51 Vt. 265. See also Pearson v. Parker, 3 N. H. 366; Flanagan v. Forrest, 94 Ga. 685; Weston v. Wiley, 78 Ind. 54

62. See Stone v. Hammell, 83 Cal. 547, 17 Am. St. R. 272, 8 L. R. A. 425.

63. White v. Miller, 47 Ind. 385; Romine v. Romine, 59 Ind. 347; Bresendine v. Martin, 1 Ired. L. (N. Car.) 286; Howland v. Martin, 1 Ired. (N. Car.) 307. See also Hommell v. Gamewell, 5 Blackf. (Ind.) 5; Stone v. Hammell, 83 Cal. 547, 17 Am. St. R. 272, 8 L. R. A. 425. Compare Weston v. Wiley, 78 Ind. 54.

64. Taylor v. Higgins, 3 East 169; Maxwell v. Jamieson, 2 B. & Al. 51; Compare Barclay v. Gooch, 2 Esp. 571; and see the remarks of Ruffin, C. J., in Brisendine v. Martin, *supra*. See also Cummons v. Hackley, 8 Johns. (N. Y.) 202; Morrison v. Berkey, 7 S. & R. (Pa.) 238; Boulware v. Robinson, 8 Tex. 327, 58 Am. D. 117.

65. See Romine v. Romine, *supra*; Bennett v. Buchanan, 3 Ind. 47; Morrison v. Berkey, 7 S. & R. (Pa.) 238; Boulware v. Robinson, 8 *supra*; Stone v. Hammell, 83 Cal. 547, 17 Am. S. R. 272, 8 L. R. A. 425.

applicable, where it exists at all, strictly at law and not in equity, at least where it appears that the surety is insolvent.⁶⁶ If the obligation of a third person be transferred in satisfaction of the principal obligation, however, the surety is entitled to recover its actual value from the principal.⁶⁷

§ 131. Express Contracts Touching Reimbursement or Indemnity. Generally, as we have seen, the principal is under no implied duty to indemnify the surety or guarantor until the latter has paid the debt or discharged the liability imposed upon him by his undertaking,⁶⁸ and then only to the amount actually paid by the latter to extinguish it.⁶⁹ But the surety may by express agreement contract for more or less than strict indemnity,⁷⁰ and where the express contract of the principal, entered into when the surety became bound, or before the debt is due, is not merely to indemnify, but to indemnify the surety against *liability*, or to save him harmless therefrom, the surety may, after the default of the principal, sue at once without having paid the debt for the amount for which the principal is in default;⁷¹ and an express

66. 1 Brandt Guar. & Sur. (3rd Ed.) and note at page 469. See also Post, sec. 156 as to payment by the surety's own obligation as a basis for contribution.

67. Rodgers v. Maw, 15 M. & W. 444; Hommell v. Gamewell, 5 Blackf. (Ind.) 5; Crozier v. Grayson, 4 J. J. Marsh (Ky.) 514, 517; Lord v. Staples, 23 N. H. 448; Ainslie v. Wilson, 7 Cow. N. Y. 662, 17 Am. D. 532; Bonney v. Seely, 2 Wend. (N. Y.) 481; Hulett v. Soullard, 26 Vt. 295; Fahey v. Frawley, 26 L. R. Ir. 78; McVicar v. Royce, 17 Up. Can. Q. B. 529. In Barber v. Gillson, 18 Nev. 89, a surety was permitted to charge the principal with the face value of the note irrespective of its actual value.

68. Ante, sec. 122.

69. Ante, sec. 127.

70. Ante, sec. 117.

71. Loosemore v. Radford, 9 M. & W. 657; Belloni v. Freeborn, 63 N. Y. 383, 390 and cases cited; Robinson v. Robinson, 24 Law Times, 112; Lathrop v. Atwood, 21 Conn. 117 (Waite, J., diss.); Gage v. Lewis, 68 Ill. 604; Devol v. McIntosh, 23 Ind. 529; Lee v. Burrell, 51 Mich. 132; Locke v. Homer, 131 Mass. 93, 96, 41 Am. R. 199; Ham v. Hill, 29 Mo. 275; Salmon Falls Bank v. Leyser, 116 Mo. 51; Sparkman v. Gove, 44 N. J. L. 252, 255-256; Port v. Jackson,

covenant by the principal directly with the surety to pay to the creditor the debt secured on a day certain, is construed as a covenant to save the surety harmless within this rule.⁷² A similar construction prevails where a grantee of mortgaged property assumes and promises his grantor to pay the mortgage debt. The grantee in such cases will be liable to the grantor, if he makes default, for the full amount of the mortgage debt.⁷³

Where the principal gave his own note to the surety for his indemnity, maturing on a day certain, it was held that the surety might recover thereon though he had not paid the debt of his principal, the fair assumption being that by making the note payable at a time certain the parties intended to provide an indemnity against suit or liability rather than against ultimate loss.⁷⁴

That the undertaking to indemnify the surety is that of a third party, would not seem to vary its construction. Under such circumstances, however, the surety indemnified cannot voluntarily release securities held or

17 Johns. (N. Y.) 239, 247; *Wilson v. Stilwell*, 9 Oh. St. 467, 75 Am. D. 477; *Wilson v. Stilwell*, 14 Oh. St. 464 to the same point. The possible hardship to the debtor through having to pay the creditor after paying the full amount of the debt to the surety, has been met by the suggestion that the surety may be regarded as holding his recovery from the principal in trust for the latter, who may have indemnity from the surety if he is compelled to pay again. See *Robinson v. Robinson*, *supra*. Where the contract to indemnify the surety and save him harmless from liability was entered into after the principal was in default, the surety was not permitted to recover before payment, though it was admitted that the result would have been otherwise had the debt not been due when the contract was made. *Pond's Admr's. v. Warner*, 2 Vt. 532. And see *Jeffers v. Johnson*, 1 Zab. (N. J.) 73.

72. See *Loosemore v. Radford*, *supra*; *Port v. Jackson*, *supra*; *Locke v. Homer*, *supra*; *Malott v. Goff*, 96 Ind. 496 and cases cited; *Rowsey v. Lynch*, 61 Mo. 560.

73. *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Foster v. Stother*, 42 Conn. 244; *Baldwin v. Emery*, 89 Me. 496; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. R. 341; *Locke v. Homer*, 131 Mass. 93; *Reed v. Paul*, 131 Mass. 129; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. R. 804, 8 L. R. A. 315n; *Sparkman v. Gove*, 44 N. J. L. 252.

74. *Russell v. La Roque*, 11 Ala. 352.

obtained from his principal without releasing his indemnitor at least *pro tanto*.⁷⁵ But where the express contract of the principal is merely to "indemnify the surety against loss," or against "damages," the surety cannot, as a rule, recover thereon at law until he has paid or otherwise suffered loss on account of his liability,⁷⁶ though he may doubtless proceed *quia timet* in equity, to compel his principal to exonerate him under such covenant, without having paid any part of the debt.⁷⁷

Pursuant to the principle that an express contract between parties excludes an implied one covering the same matter, an express contract as to the indemnification of a surety excludes the remedy by implied assumption.⁷⁸

§ 132. Corporate Surety Bonds—Evidence Against the Risk Where Company Seeks Reimbursement. The fact that the surety company has paid or settled for a loss under its bond, or that judgment has gone against it in favor of the obligee is not, in the absence of special contract terms, conclusive upon the risk in an action by the company for indemnity, and an express agreement between the risk and the company that a mere settlement with the obligee and the voucher thereof should be conclusive evidence of liability has been held void as against public policy.⁷⁹ A provision, however, that a voucher of

75. *Pope v. Davidson*, 5 J. J. Marsh. (Ky.) 400.

76. 2 Suth. on Dam. (2nd Ed.) sec. 761 and cases cited; *Holme v. Rhodes*, 1 Bos. & P. 640; *Jackson v. Post*, 17 Johns. (N. Y.) 482; *Gilbert v. Wiman*, 1 N. Y. (1 Comst.) 550, 49 Am. D. 359 and note; *Crippen v. Thompson*, 6 Barb. (N. Y.) 534; *Ham v. Hill*, 29 Mo. 275.

77. *Post*, sec. 177; *Lee v. Rook*, *Moseley*, 318.

78. *Toussaint v. Martinnant*, 2 Term R. 100. See *Cabells Ex'rs. v. Megginson's Adm'rs*, 6 Munf. (Va.) 202; *Gilbert v. Adams*, 99 Ia. 519.

79. *Fidelity & Cas. Co. v. Eickhoff*, 63 Minn. 170, 56 Am. St. R. 464 followed in 76 Minn. 450. Similarly as to a stipulation that the president of a street railway company should be the final and sole arbiter of a conductor's liability. *White v. Middlesex R. Co.*, 135 Mass. 216. *Contra*, *London Tramways Co. v. Bailey*, L. R. 3 Q. B. 217. A stipulation that the voucher of payment should be conclusive

payment shall be prima facie evidence against the risk will be upheld.⁸⁰

against the risk was upheld in *Guaranty Co. of N. A. v. Pitts*, 30 So. 758 (Miss.). See also, *Fidelity & Cas. Co. v. Harder*, 212 Pa. 60.

80. *Fid & Guar. Co. v. Eickhoff*, *supra*.

CHAPTER XII.

SURETY'S RIGHT OF SUBROGATION.

§ 133. **Of the Nature of the Right—In General.** Subrogation or the right of subrogation may be generally described as the equity by which a person who is secondarily liable for a debt and has paid the same, is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration or indemnification as against the principal debtor, or of contribution from others who are liable in the same rank with himself.¹ The right of subrogation is expressly given or reserved by most policies of fidelity, contract and credit insurance but doubtless exists as to such insurances by the settled principles of the law of suretyship and insurance.²

The equity or right of subrogation or substitution as it is sometimes called, originated in the civil law,³ and its general character, and the attitude of the courts toward it, particularly in cases of suretyship, is forcibly ex-

1. See *Fuller v. John S. Davis' Sons*, 184 Ill. 505, 513; *Sands v. Durham*, 99 Va. 263, 86 Am. St. R. 884, 54 L. R. A. 622. See also *Chaffe v. Oliver*, 39 Ark. 531, 542; *Bisph. Eq.* (3rd Ed.) sec. 35; *Goldsmith v. Stewart*, 45 Ark. 149, 154; *Robinson v. Roos*, 138 Ill. 550; *Leavett v. Canadian Pac. Ry.*, 90 Me. 153, 38 L. R. A. 152; *Houston v. Branch Bank*, 25 Ala. 257; *Mansfield v. City of New York*, 165 N. Y. 208, 214; *Burrus v. Cook*, 215 Mo. 496; *Spray v. Rodman*, 43 Ind. 225, 228; *Sheldon*, Subr. 1, 2; *Hampton v. Phipps*, 108 U. S. 260; *Scanland v. Settle*, Meigs (Tenn.) 169 and note. Prof. Langdell in 1 Harv. L. Rev. pp. 68, 69, points out the nature of the equity very clearly. See also as to the origin, nature and scope of the right, the note to *American Bonding Co. v. National etc. Bank* in 99 Am. St. R. 476 et seq.

2. *Lewis v. U. S. Fid. & Guar. Co.*, 144 Ky. 425, Ann. Cas. (A. 1913), 564 and note. See also *London Guar. etc. Co. v. Geddes*, 22 Fed. 639; *Fidelity etc. Co. v. Eickhoff*, 63 Minn. 170, 30 L. R. A. 586, 56 Am. St. R. 464; *People ex rel. Lawyers Surety Co. v. Anthony*, 7 N. Y. App. Div. 132.

3. *Shinn v. Budd*, 14 N. J. Eq. 234.

pressed by Lord Brougham in *Hodgson v. Shaw*,^{3a} as follows: "The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or quasi contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. A surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." Though the right is of equitable origin and rests upon purely equitable considerations, and was formerly available solely in equity, it has become cognizable at law, at least to this extent; that when the right of action to which the plaintiff asks to be subrogated is a legal one, a court of law may treat him as an equitable assignee and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated.⁴

The right of subrogation arises from natural equity and not out of any contract express or implied and its foundation is, that any fund or security placed by the principal debtor in the hands of the creditor or of any surety, is a trust fund for the benefit of all parties con-

3a. 3 Myl. & K. 183.

4. *Dunlop v. James*, 174 N. Y. 412, 415, 30 Abbott's N. C. 176, note. See also *Rollins v. Taber*, 25 Me. 144; *Granite Nat.-Bank v. Fitch*, 145 Mass. 567, 1 Am. St. R. 484; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. D. 207; *Hidden v. Bishop*, 5 R. I. 29.

cerned in the suretyship transaction. The foundation of this equity as forcibly stated by Mr. Justice Matthews will be found in the note below.⁵

The right of subrogation has its most frequent application in favor of sureties, for whose relief it seems to have been originally applied. It grows naturally out of the surety's right of reimbursement by his principal and contribution from co-sureties, and it may be stated generally that a surety, on paying the debt of his principal, is entitled to be subrogated to all the securities, funds, liens, remedies, priorities and equities which the creditor has or holds against the principal debtor, as a means of enforcing payment from him,⁶ and to all securities

5. "Many sufficient maxims of the law conspire to justify the rule. To avoid circuitry and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefitted, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specially pledged and sought to be primarily applied is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made." Per Matthews, J., in *Hampton v. Phipps*, 108 U. S. 260. See also the extended discussion in *Lumpkin v. Mills*, 4 Ga. 343.

6. *Sheldon on Subrogation* (2nd Ed.), sec. 86; *Lidderdale v. Robinson*, 12 Wheat. (U. S.), 594; *Pomeroy's Eq. Jur.* (2nd Ed.) sec. 1419; *Goddard v. Whyte*, 2 Giff. 449; *Lumpkin v. Mills*, 4 Ga. 343;

held of the principal by his co-sureties as security for the debt, to enforce his equity of contribution against them.⁷

Furthermore the creditor is entitled to be subrogated to such securities as the surety himself may take from the principal debtor for the better security of the debt. As to these, the surety is regarded as a trustee of the creditor as well as of his co-sureties,⁸ unless, according to some decisions at least, the security was given for the sole purpose of securing the surety rather than for securing the debt itself.

§ 134. Administered on Equitable Principles. Subrogation, being of equitable origin, is administered upon equitable principles, and consequently will be carried no further than equity requires. The surety cannot, therefore, in virtue of the right, claim more than actual indemnity under rules stated under another head,⁹ nor can he enforce it, usually, until the creditor has been fully satisfied,¹⁰ or to the detriment of bona fide purchasers or incumbrancers without notice of his rights,¹¹ or so as to cut off rights or equities that have previously attached and of which the surety has actual or legal no-

Uzzell v. Mack, 4 *Humph.* (Tenn.) 319, 40 *Am. D.* 648; *Pierde v. Holzer*, 65 *Mich.* 263; *Jackson v. Davis*, 4 *Mackey* (D. C.) 194; *Orem v. Wrightson*, 51 *Md.* 34, 34 *Am. R.* 286; *American Bonding Co. v. National etc. Bank*, 97 *Md.* 395 and cases cited in the opinion and in the note to that case in 93 *Am. St. R.* 507.

7. *Post*, sec. 168.

8. *Wright v. Morely*, 11 *Ves.* 22; *Vail v. Foster*, 4 *N. Y.* 312; *Bank of Auburn v. Throop*, 18 *Johns.* (N. Y.) 505; *Post*, secs. 181, 168 et seq.

9. *Ante*, sec. 127; *Geiske v. Johnson*, 115 *Ind.* 308 and authorities cited; *Harker v. Moore*, 40 *W. Va.* 49; *Heisler v. Aultman*, 56 *Minn.* 454, 45 *Am. St. R.* 486. See also the note in 99 *Am. St. R.* 480, 481.

10. *Post*, sec. 136; *Musgrave v. Dickson*, 172 *Pa.* 629, 51 *Am. St. R.* 765.

11. See *Richards v. Griffith*, 92 *Cal.* 493, 27 *Am. St. R.* 156; *Annick v. Woodworth*, 58 *Oh. St.* 86; *Ahern v. Freeman*, 46 *Minn.* 156, 24 *Am. St. R.* 206; *Heisler v. Aultman*, 56 *Minn.* 454, 45 *Am. St. R.* 486; *Crisfield v. Murdock*, 127 *N. Y.* 315.

tice.¹² Nor will it be so enforced as to substantially impair the rights of the creditor, merely to give the surety a better footing.¹³ Neither, as will presently be seen, will it be enforced in favor of a mere volunteer,¹⁴ nor, as a rule, in favor of a surety whose undertaking stays the remedy against the principal, as against prior sureties for the same debt, unless there is an express or implied undertaking on their part to indemnify him.¹⁵ So, a surety has no right to be subrogated to the place of a creditor and yet be exempt from the rule that requires one who has resort to two funds shall be confined to one of them so as to leave the other to a creditor who can resort to the latter only.¹⁶

§ 135. Same—Subrogation as Against Third Persons—Ignorance of Securities—Securities Given Since Surety Became Bound. The surety's equity of subrogation extends not only to securities in the hands of the creditor himself, but will be enforced against all claiming under him, unless they be bona fide purchasers or encumbrances for value without notice of the rights of the surety, in which latter case it does not attach.¹⁷

As the surety's right rests upon the principles of equity rather than upon any agreement, he is entitled to subrogation to all collateral securities held by the creditor from the principal for the debt or obligation se-

12. *Spinkle v. Huffman*, 52 Neb. 20. See *Heisler v. Aultman*, *supra*.

13. *Grubbs v. Wysors*, 32 Gratt. (Va.) 127; *Richardson v. Washington Bank*, 3 Met. (Mass.) 536.

14. Post, sec. 136; *Prairie State Bank v. U. S.*, 164 U. S. 22.

15. Post, sec. 152; *Opp. v. Ward*, 125 Ind. 241, 21 Am. St. R. 220 and cases cited; *Campbell v. Rothwell*, 47 L. J. Q. B. 144; *Havens v. Willis*, 100 N. Y. 482.

16. *Schmitt v. Henneberry*, 48 Ill. App. 322.

17. *Farebrother v. Wodehouse*, 23 Beav. 18; *Drew v. Lockett*, 32 Beav. 499; *Atwood v. Vincent*, 17 Conn. 575; *Greene v. Ferrie*, 1 De-saus. Eq. (S. Car.) 164. Compare *Williams v. Owen*, 13 Sim. 597; *Bowker v. Bull*, 1 Sim. (N. S.) 29; *Smith v. Schneider*, 23 Mo. 447; *Knickerbocker Tr. Co. v. Cartaret Steel Co.*, 79 N. J. Eq. 501.

cured, though he knew nothing of them when he signed as surety;¹⁸ and the right attaches to securities given after, as well as before, the surety became bound,¹⁹ even though there was a contract for other specific indemnity when the surety became liable.²⁰

If a creditor has both collateral security and a surety for a particular claim and acquires an additional claim against the same principal, to which the agreement upon which the security was originally taken does not extend, the surety will be at once subrogated to such security upon the payment of the first indebtedness only, and the creditor cannot deprive the surety without his consent of his right of subrogation thereto by any application that he may make of the security or its proceeds.²¹

§ 136. When the Surety's Right to Subrogation Arises or Becomes Enforceable. Though the surety's right to subrogation arises the moment he becomes bound, it becomes enforceable as a rule only where he pays the debt or discharges the obligation of his principal.²² As the right itself rests upon the principles of equity, it will be recognized and administered with due regard to the rights of the creditor. Until the creditor has received his debt and every part of it, both principal and interest, he has a right to retain and control whatever securities

18. *Mayhew v. Crickett*, 2 Swanst. 185, 191; 2 Wils. Ch. 418; *Lake v. Bruton*, 8 D. M. & G. 440, 8 Eng. L. & Eq. 443; *Duncan, Fox & Co. v. North & South Wales Bank*, 6 App. Cas. 1; *Smith v. McLeod*, 3 Ired. Eq. (N. C.) 390; *Dempsey v. Bush*, 18 Oh. St. 376; *Hevener v. Berry*, 17 W. Va. 474; *Scott v. Knox*, 2 Jones Eq. (S. Car.) 778.

19. *Brandon v. Brandon*, 3 De G. & J. 524; *Lake v. Bruton*, *supra*; *Freaner v. Yingling*, 37 Md. 491; Post, sec. 243 and cases cited in note E.

20. *Lake v. Bruton*, *supra*.

21. *National Exchange Bank v. Silliman*, 65 N. Y. 475. See also, *Forbes v. Jackson*, 19 Ch. Div. 615; *Holliday v. Brown*, 50 N. W. Rep. 1042.

22. *Prairie State Bank v. U. S.*, 164 U. S. 227; *Wayland v. Tucker*, 4 Gratt. (Va.) 268, 50 Am. D. 76.

and exercise whatever remedies, direct or collateral, he has or holds from or against the principal debtor.²³

Even where the surety is bound for part only of a debt and has paid the entire amount for which he was bound, he is not entitled to subrogation to securities held for the whole debt until such debt is fully discharged.²⁴ In this respect the surety's right to subrogation is not coextensive with his right to indemnity, for he may claim indemnity to the extent that he has paid the principal's debt though a balance remains unpaid;²⁵ and if the surety is himself indebted to the principal, neither he nor the creditor will be subrogated to the securities of the principal until such indebtedness is extinguished,²⁶ though the principal will not be permitted to recover of the surety without indemnifying him against liability to the creditor.²⁷ If the entire debt has been paid, however, the surety is entitled to subrogation, though part only was paid by him and the rest by the principal,²⁸ and he may, even where part of the debt remains unpaid, reimburse himself out of the principal's securities, or some part of them, if the creditor consents, or his con-

23. *Ames v. Huse*, 55 Mo. 422; *Kynor v. Kynor*, 6 Watts (Pa.) 227; *Lee v. Griffin*, 31 Miss. 632; *Musgrave v. Dickson*, 172 Pa. 629; 51 Am. St. R. 765; *Richeson v. Nat. Bank of Mena*, 96 Ark. 594; *Opp v. Ward*, 125 Ind. 241, 21 Am. St. R. 220; *Parrott v. Chester-town Bank*, 88 Md. 515; *Good v. Golden*, 73 Miss. 91, 55 Am. St. R. 486; *Boston v. Brent*, 87 Va. 385; *Smith v. Nat. Sur. Co.*, 28 N. Y. Misc. 628; *Gannett v. Blodgett*, 39 N. H. 150 and cases cited; Post, next section and cases cited in note 33.

24. *Cooper v. Jenkins*, 32 Beav. 337, 1 New Rep. 383; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 253; *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270; *Hopkinson Bank v. Rudy*, 2 Bush. (Ky.) 326; *Rice v. Morris*, 82 Ind. 204. But he may pay the whole debt and succeed to the rights of the creditor as against the others liable therefor. *Gerber v. Sharp*, 72 Ind. 553.

25. Ante, sec. 122.

26. *Wright v. Crump*, 25 Ind. 339; *Coates' Appeal*, 7 W. & S. (Pa.) 99; *Dwight v. Scranton Lumber Co.*, 82 Mich. 624. Compare *Barney v. Grover*, 28 Vt. 391.

27. *Mattingly v. Sutton*, 19 W. Va. 19; *Walker v. Dicks*, 80 N. Car. 263.

28. *McGee v. Leggett*, 48 Miss. 139; *Neal v. Buffington*, 42 W. Va. 327.

tract with the latter so provides. This is often termed conventional subrogation as distinguished from legal subrogation which arises upon mere equitable principles, by operation of law.²⁹ Indeed the right or equity of subrogation is subject to the contract or convention of the parties practically without limitation and may thus be wholly relinquished or otherwise dealt with as they may see fit.³⁰

Neither need payment be made in money. Whatever by way of compromise, or accord and satisfaction would constitute such payment as would entitle the surety to proceed against his principal for indemnity under rules elsewhere laid down, would entitle him to enforce his right of subrogation, provided it extinguishes the whole debt.³¹

But though the surety's right to subrogation does not become enforceable until he has paid the debt, he may, if the principal becomes insolvent, retain in his hands property or assets belonging to his principal, even as against bona fide purchasers, for otherwise he would be without remedy, contrary to the plainest principles of justice.³²

29. Brice's Appeal, 95 Pa. 145; Shreve v. Hankinson, 34 N. J. Eq. 76; Morrow v. United States Mortgage Co., 96 Ind. 21.

30. See Sheldon on Subrogation (2nd Ed.), secs. 5, 248; Cooper v. Jenkins, 32 Beav. 337; Tyns v. Jarnette, 26 Ala. 280; Wilkins v. Gibson, 113 Ga. 42, 84 Am. St. R. 204.

31. Ante, sec. 130; Keokuk v. Love, 31 Ia. 119; Knighton v. Curry, 62 Ala. 404; Combs v. Candler, 95 Va. 7; Brandt Sur. & Guar. (3rd Ed.) sec. 332. A court of equity with the parties before it may in advance of payment declare the rights of parties when they shall have paid. Keokuk v. Love, supra.

32. Battle v. Hart, 2 Dev. Eq. (N. Car.) 31; Williams v. Helme, 1 Dev. Eq. (N. Car.) 151, 18 Am. Dec. 580; McKnight v. Bradley, 10 Rich. Eq. (S. Car.) 557; Abbey v. Van Campen, 1 Freem. Ch. (Miss.) 273; Loughridge v. Bowland, 52 Miss. 546; McMillan v. Bull's Head Bank, 32 Ind. 11; 2 Am. R. 323; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398; Crafts v. Mott, 5 Barb. (N. Y.) 305; Affirmed, 4 N. Y. (Comst.) 604; Beaver v. Beaver, 23 Pa. St. 167; Moorhead's Appeal, 32 Pa. St. 297; McKee v. Scobee, 80 Ky. 124. It has recently been held that where the payee of a promissory note indorsed the same before due to a surety thereon, such surety takes all the rights

§ 137. Surety for One of Several Debts or Installments. Where, by virtue of the transaction in which the surety became bound, the same security is taken for several debts or installments of debt, and the surety is bound for one or some of such debts or installments only, he is not entitled upon payment of his own obligation to have such security or any part of it, until the other debts or installments are paid.³³

Where, however, the creditor has taken both a mortgage and a surety for a particular debt, and the principal afterwards gives another mortgage on the same property to the same creditor for a second loan or advance for which the surety is not bound, the creditor being aware of the fact of suretyship for the first debt, cannot insist upon holding the security for the second

of such payee; and, in cases where the payee could have obtained an attachment under statute authorizing attachment upon claims before due, the surety is entitled to the same remedy. *Danker v. Jacobs*, 79 Neb. 435 (1907).

33. *Farebrother v. Wodehouse*, 23 Beav. 18; *Grubbs v. Wysors*, 32 Gratt (Va.) 127; *Zook v. Clemmer*, 44 Ind. 15; *Vert v. Voss*, 74 Ind. 565; *Rice v. Morris*, 82 Ind. 204; *Hopkinsville Bank v. Rudy*, 2 Bush. (Ky.) 326; *Welch v. Parran*, 2 Gill (Md.) 320; *Parker v. Mercer*, 6 How. 320, 38 Am. D. 438-n; *Mathews v. Switzler*, 46 Mo. 301; *Willingham v. Ohio etc. Tr. Co.*, 22 Ky. L. 158; *Richeson v. Nat. Bank of Mena*, 96 Ark. 594. Compare *Allison v. Sutterlin*, 50 Mo. 274. One who is surety for several notes secured by the same mortgage is not entitled, upon paying one of them, to subrogation as against the holders of the others. *Massie v. Mann*, 17 Ia. 131; *Carithers v. Stuart*, 87 Ind. 424; *Gannet v. Blodgett*, 39 N. H. 150. See *Lynch v. Hancock*, 14 S. Car. 66 holding that a surety on one of several bonds secured by mortgage was subrogated, upon paying such bond to a proportionate part of the mortgage with the mortgagee as his trustee. If one holds security, without special agreement as to its application, for various sums due him from the same debtor for some of which sums he has sureties, he may, in case of the insolvency of the principal and some of the sureties, apply the securities upon such of the debts as may be necessary for his own protection. In other words, the sureties in such cases, can claim subrogation to the security only upon payment or tender of all of the debts for which such security was given. *Wilcox v. Fair Haven Bank*, 7 Allen (Mass.) 270. See also, *Richardson v. Washington Bank*, 3 Met. (Mass.) 536; *Union Bank v. Edwards*, 1 Gill. & J. (Md.) 346; *Stone v. Seymour*, 15 Wend. (N. Y.) 19; *Mathews v. Switzler*, 46 Mo. 301.

debt as against the surety for the first one who has paid it;³⁴ and sureties for the second or subsequent debt are likewise postponed in the absence of special agreement with the first sureties.³⁵

§ 138. Payment by Guarantor or Surety Must be Compulsory—Volunteers. Generally, in order that one who has paid the debt of another shall be entitled to indemnity and subrogation, he must not be what is technically termed with reference to the law of subrogation, a mere stranger or volunteer.³⁶ Though payment by a volunteer extinguishes the debt as against the principal, it gives no rights against him or his securities, for the debtor has a right to leave his debt unpaid, and it may be to his interest that it should remain so.

In a legal or technical sense, a stranger or volunteer is a gratuitous intermeddler, or, more specifically, one who, being under no legal or equitable obligation to pay the debt of another, having no real or supposed interest of his own to protect, and without the request of the debtor, pays such debt without any agreement with either debtor or creditor that he shall be subrogated to the creditor's rights.³⁷ In general it may be said that anyone who, without the request of the debtor, pays, a

34. *Pearl v. Deacon*, 24 Beav. 186, 1 De G. & J. 461; *Green v. Wynn*, L. R. 4 Ch. 204; *Forbes v. Jackson*, 19 Ch. Div. 616, overruling *Williams v. Owen*, 13 Sim. 597; *National Exchange Bank v. Silliman*, 65 N. Y. 475; *Simmond v. Cates*, 56 Ga. 609; *Perry v. Miller*, 54 Ia. 277; *Ottawa Bank v. Dudgeon*, 65 Ill. 11; *Pence v. Armstrong*, 95 Ind. 191.

35. *National Exchange Bank v. Silliman*, *supra*.

36. 1 *Brandt Sur. & Guar.* (3rd Ed.) sec. 325; *Sheldon on Subrogation*, (2nd Ed.) secs. 1, 245, 246; *Henningsen v. U. S. Fid. & Guar. Co.*, 208 U. S. 404; *Shinn v. Budd*, 14 N. J. Eq. 234; *Gadsden v. Brown*, 1 *Spear's Eq. (S. Car.)* 41; *Sandford v. McLean*, 3 *Paige (N. Y.)* 117, 122 and cases cited throughout this section and the next.

37. See *Irvine v. Angus*, 93 Fed. 629, 35 C. C. A. 501; *Woomer v. Waterloo Agr. Works*, 62 Ia. 699; *Arnold v. Green*, 116 N. Y. 566; *Bennett v. Chandler*, 199 Ill. 97; *Rodman v. Sanders*, 44 Ark. 504.

debt, is a volunteer and is not entitled to subrogation in the absence of a contract therefor, either with the debtor or with the creditor, where he may elect without loss or liability to himself either to pay the debt or not.³⁸ The principle as to volunteers is also quite clearly stated by Chancellor Walworth in *Sanford v. McLean*,³⁹ as follows: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own right, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor, which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

It has been held, however, that a moral or equitable obligation is sufficient to deprive the party paying of the character of a volunteer, and a guarantor who paid in spite of the defense of the Statute of frauds was entitled to subrogation.⁴⁰ But the mere loaning of money to enable the borrower to pay a debt has never been held to give to the lender the rights of a surety or to deprive him of the character of a volunteer. A stranger who voluntarily pays the debt of another, however, and takes an assignment thereof at the time of payment, or even afterwards, pursuant to an agreement with the creditor made at the time of payment, may enforce the claim against the debtor,⁴¹ and whoever pays at the instance,

38. See *Gladsden v. Brown*, Spear's Eq. (S. Car.) 41; *Watson v. Wilcox*, 39 Wis. 643, 20 Am. R. 63; *Shinn v. Budd*, 14 N. J. Eq. 234, and authorities cited; *Fay v. Fay*, 43 N. J. Eq. 428.

39. 3 Paige (N. Y.) 117, 23 Am. D. 773, quoted with approval in *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534; *De Sot v. Ross*, 95 Mich. 81, and *Watson v. Wilcox*, *supra*.

40. See *Slack v. Kirk*, 67 Pa. St. 380, 5 Am. R. 438.

41. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. R. 872; *Rodman v. Sanders*, 44 Ark. 504; *Patterson v. Clark*, 96 Ga. 494; *Shinn v. Budd*, 14 N. J. Eq. 234.

solicitation or request of the debtor cannot be regarded as a volunteer, and is entitled to subrogation.⁴²

§ 139. **Same—Surety Signing Without Request.** One who is actually bound as a surety or guarantor at the request, express or implied, of his principal, is of course not a volunteer, and is entitled upon payment to be subrogated to all the remedies and securities of the creditor against the principal debtor. But whether one who has become a surety or guarantor without such request is in the nature of a volunteer and so disentitled to reimbursement, is not, as we have seen, uniformly decided, at least where there is no express agreement that the surety paying shall be subrogated to the rights of the creditor by assignment or otherwise.⁴³ But whatever may be the rule as to the right to maintain an implied assumpsit for reimbursement against the principal who has not requested the surety to sign, it would seem clear that the surety paying should be considered an equitable assignee of securities purely collateral, provided he was legally bound to pay;⁴⁴ and though a fidelity or other corporate surety bond contains no provisions for subrogation, and the risk has neither joined in its execution or otherwise requested the surety to become bound, the company, upon payment, should be subrogated, conformably to principles both of public policy and of insurance law, to the claim of the beneficiary therein against the risk.⁴⁵ Such bonds, however, almost invariably contain express provisions as to substitution.

42. *Gano v. Thierne*, 93 N. Y. 225; *Motes v. Robertson*, 133 Ala. 630; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. R. 146.

43. See *Ante* sec. 118. The request to become surety by one joint maker of a note is held sufficient to give indemnity and subrogation as against both. *Hoffman v. Butler*, 105 Ind. 371.

44. *Matthews v. Aiken*, 1 N. Y. (Comst.) 595.

45. *London Guar. Accident Co. v. Geddes*, 22 Fed. 639; *Gen'l Ry. Signal Co. v. Title Guar. & Sur. Co.*, 203 N. Y. 407, 412. But the right of subrogation does not extend to a third person whose negligence contributed to the default, in this case a bank paying checks forged by the risk. *Am. Bonding Co. v. First Nat Bank*, 27 Ky. L. 393.

§ 140. Subrogation of Surety to Specialty or Judgment—Direct and Collateral Securities. It is the general rule that in equity a surety is subrogated upon payment of the debt to the benefit of all the securities for the debt which the creditor holds against the principal. This rule applies universally to all securities that are purely collateral.⁴⁶ It was finally settled in England, however, that this subrogation must be limited to such securities only as continue to exist and are not ipso facto extinguished by the act of payment, and that payment by the surety of a bond or other specialty executed by, or of a judgment recovered against, both principal and surety, extinguished the obligation so as to prevent any subrogation of the surety thereto.⁴⁷

But this technical rule has been held not to apply where the principal and surety are bound by separate

46. *Copis v. Middleton*, 1 Turn. & Russ. 224; *Hodgson v. Shaw*, 3 Mylne & K. 183; *Yonge v. Reynell*, 9 Hare, 809; *Fawcetts v. Kimmey*, 33 Ala. 261; *Talbot v. Wilkins*, 31 Ark. 411; *Billings v. Sprague*, 49 Ill. 509; *Jacques v. Fackney*, 64 Ill. 87; *Beaver v. Slanker*, 94 Ill. 175; *Jones v. Tincher*, 15 Ind. 308, 77 Am. D. 92; *Josselyn v. Edwards*, 57 Ind. 212; *Murray v. Catlett*, 4 Greene (Iowa) 108; *Sears v. Laforce*, 17 Iowa, 473; *Keokuk v. Love*, 31 Iowa 119; *Rand v. Barrett*, 66 Ia. 731; *Storms v. Storms*, 3 Bush. (Ky.) 77; *Norton v. Soule*, 3 Greenl. (Me.) 341; *McArthur v. Martin*, 23 Minn. 74; *Felton v. Bissell*, 25 Minn. 15; *Connor v. Howe*, 35 Minn. 518; *Torp v. Gussett*, 37 Minn. 135; *Allison v. Sutterlin*, 50 Mo. 274; *May v. Burk*, 80 Mo. 675; *Taylor v. Tarr*, 84 Mo. 420; *Wilson v. Burney*, 8 Neb. 39; *Guthrie v. Ray*, 36 Neb. 612; *Young v. Vough*, 23 N. J. Eq. 325; *Lewis v. Palmer*, 28 N. Y. 271; *State Bank v. Smith*, 155 N. Y. 185; *Toronto Bank v. Hunter*, 4 Bosw. (N. Y.) 646; *Blalock v. Peake*, 3 Jones Eq. (N. C.) 323; *Liles v. Rogers*, 113 N. Car. 197, 200, 37 Am. St. R. 627; *Holden v. Strickland*, 116 N. Ca. 185; *Gossin v. Brown*, 11 Pa. 527; *Klopp v. Lebanon Bank*, 46 Pa. 88; *James v. Jaques*, 26 Tex. 320, 82 Am. D. 613; *Nat. Bank v. Cushing*, 53 Vt. 321; *Mason v. Pierron*, 63 Wis. 239; *McNeale v. Reed*, 7 Ir. Ch. 251 and a multitude of decisions in 68 L. R. A. 530. *Contra* (semble), *Moore v. Campbell*, 36 Vt. 361. See also, *Bockholt v. Kraft*, 78 Iowa 661; *Browning v. Porter*, 116 N. Car. 32.

47. *Sheldon on Subrogation* (2nd Ed.) sec. 135, citing *Jones v. Davids*, 4 Russ. 277; *Copis v. Middleton*, Turn. & Russ. 224; *Armitage v. Baldwin*, 5 Beav. 279; *Dowbiggen v. Bourne*, 2 You. & Coll. (Exch.) 462; *Hodgson v. Shaw*, 3 M. & K. 183. But see the earlier cases of *Wright v. Morley*, 11 Ves. 21; *Parsons v. Briddock*, 2 Vern. 608.

contracts or instruments, though for the same debt or undertaking and upon the same terms, for payment by the surety in such cases, whether before or after judgment, discharges his own liability only, leaving him the right of subrogation to the security given by his principal, or the judgment based thereon;⁴⁸ nor does it apply where the surety pays a judgment against the principal alone, though it is based upon the joint and several obligation of the principal and surety;⁴⁹ and where, under statutes like those of New York, successive parties to commercial paper can be joined and judgment obtained against all, such judgment is regarded as union of so many separate judgments, and if a defendant who is secondarily liable satisfies it, he is subrogated to the rights of the creditor thereunder.⁵⁰

The result of the English decisions was, with the exceptions just noted, that a surety paying such specialty upon which he was jointly or jointly and severally bound

48. *Hodgson v. Shaw*, *supra*; *In re Lord Churchill*, 39 Ch. D. 174; *Brown v. Decatur*, 4 Cranch C. C. 477; *Dodd v. Wilson*, 4 Del. Ch. 399; *Livingston v. Anderson*, 80 Ga. 175; *Allen v. Powell*, 108 Ill. 584; *Downey v. Washburn*, 79 Ind. 242. *Tardy v. Allen*, 3 La. Ann. 66; *Bishop v. Rowe*, 71 Me. 263; *Ferguson v. Carson*, 86 Mo. 673; *Townsend v. Whitney*, 75 N. Y. 425; *Gifford v. Rising*, 12 N. Y. Supp. 430; *First Bank v. Woolsey*, 31 N. Y. App. Div. 61; *Pott v. Nathans*, 1 Watts & S. (Pa.) 155, 37 Am. D. 456; *Elkinton v. Newman*, 20 Pa. 281; *Enders v. Brune*, 4 Rand. (Va.) 438; *Robinson v. Sherman*, 2 Gratt. (Va.) 178, 44 Am. D. 381; *Hill v. Manser*, 11 Gratt. (Va.) 522 and cases cited; *Murray v. Meade*, 5 Wash. 693; *La Touche v. Pallas*, *Hayes*, 450. But see *contra*, *Morse v. Williams*, 22 Me. 17.

49. *Norris v. Ham*, R. M. Charl. (Ga.) 267; *Sotheren v. Reed*, 4 Har. & J. (Md.) 307; *Perkins v. Kershaw*, 1 Hill, Ch. (S. Car.) 235; *Thomson v. Palmer*, 3 Rich. Eq. (S. Car.) 139; *Hill v. Kelly*, Ir. T. R. 265; *Purdon v. Purdon*, 1 Hud. & Bro. 229. See *Kent v. Canter*, Wall (Ir.) 364; *Cottrell's Appeal*, 23 Pa. 294; *Enders v. Brune*, 4 Rand. (Va.) 438; *Hill v. Manser*, 11 Gratt. (Va.) 522. But see *Dowbiggen v. Bourne*, 2 You. & Coll. (Exch.) 462, holding that a surety who pays a separate judgment against his principal is not entitled to subrogation where it was based upon the joint and several obligation of both principal and surety. To the same effect are *State v. Miller*, 5 Blackf. (Ind.) 381.

50. *Corey v. White*, 3 Barb. (N. Y.) 12, overruling *Bank of Salina v. Abbott*, 3 Denio (N. Y.) 181. See also *Knightson v. Curry*, 62 Ala. 404.

with his principal, or a judgment against himself and his principal jointly, became a mere simple contract creditor of his principal, unless he had taken a counter bond, when he was of course a specialty creditor as to the latter in accordance with its conditions.⁵¹

This technical rule has been recognized in several of our states, and so closely was it adhered to in some of them that the surety could not, even by taking an assignment of the judgment or specialty to himself,⁵² or even to a third person for his benefit, or by an agreement with the creditor that it was to be kept alive for his benefit, become a judgment or specialty creditor of the principal. Payment by either principal or surety was such a complete discharge of the judgment or specialty both at law and in equity that there was nothing to be assigned or kept alive,⁵³ though the rule in North Carolina and Vermont permitted the judgment to be assigned to a third person in trust for the surety, to enforce it for his benefit, and such an assignment still seems necessary, at least in the former state.⁵⁴

Though this rule that a co-debtor surety by judg-

51. *Hodgson v. Shaw*, 3 Myl. & K. 183; *Jones v. Davids*, 4 Russ. Ch. 277; *Copis v. Middleton*, supra. See *Bank of Salina v. Abbott*, 3 Denio (N. Y.) 181; *Newbern v. Dawson*, 10 Ired. (N. Car.) 436; *Morrison v. Marvin*, 6 Ala. 797; *Chollar v. Temple*, 39 Ark. 238; *Simpkins v. McKinney*, 4 Ga. 343; *Bohes v. Aiken*, 35 Ia. 534; *Drefahl v. Tuttle*, 42 Iowa 177; *Wilson v. Ridgely*, 46 Md. 235; *McDaniels v. Lee*, 37 Mo. 204; *Hull v. Sherwood*, 59 Mo. 172; *Ontario Bank v. Walker*, 1 Hill (N. Y.) 652; *Briley v. Sugg*, 1 Dev. & B. Eq. 366; *Fort Worth Bank v. Dougherty*, 81 Tex. 301.

52. *Jones v. Davids*, 4 Russ. Ch. 277.

53. See *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. D. 236; *Preslar v. Stalworth*, 37 Ala. 402; *Faires v. Cockrell*, 88 Tex. 428; *Fort Worth Bank v. Dougherty*, 81 Tex. 301.

54. *Fidelity Co. v. Jordan*, 134 N. Car. 236, 239 and cases cited. *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. R. 627. The English law is said to have permitted the security to be kept alive by assignment to a stranger. See *Hanner v. Douglass*, 57 N. Car. (4 Jones Eq.) 263, but this is doubtful. See *Woffington v. Sparks*, 2 Ves. Sr. 569; *Jones v. Davids*, 4 Russ. Ch. 277. Compare *Hotham v. Stone*, Turn. & Russ, 226, note. See as to payment by a joint debtor not a surety. Post, sec. 142.

ment or specialty who pays the debt is a simple contract creditor of his principal has been recognized, as we have seen, in some of our states, its manifest inequity and the technical and unsatisfactory reasoning upon which it was based led to its judicial repudiation in most of them, at least in equity, and the adoption of the rule of the civil law and the earlier English law by which the surety, upon payment of the whole debt, was entitled not merely to all collateral securities, but to the very debt itself as against the creditor, by way of cession or assignment, and upon such assignment, the debt is, in favor of the surety, treated, not so much paid as sold, not as extinguished, but as transferred, with all its obligatory force against the principal,⁵⁵ unless it was the intention of the surety to extinguish the debt and not to keep it alive for his own benefit; an intention that will not be presumed from the fact of payment alone.^{55a} As said by Chief Justice Marshall in *Lidderdale v. Robinson*:⁵⁶ "When a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged."⁵⁷

55. 1 Story Eq. sec. 500; *Lumpkin v. Mills*, 4 Ga. 343. That this was substantially the rule of the earlier English law see *Wright v. Morly*, 11 Ves. 21, and *Parsons v. Briddock*, 2 Vern. 608, discussed in *Copis v. Middleton*, Turn & R. 224, and *Hodgson v. Shaw*, 3 Myl. & K. 183, discussing the above and other cases.

55a. See *Ketchum v. Duncan*, 96 U. S. 659; *Hill v. King*, 48 Oh. St. 75; *McArthur v. Martin*, 23 Minn. 74; *Gossin v. Brown*, 11 Pa. 527.

56. 2 Brock (U. S.) 159.

57. See similar remarks and numerous authorities in *Ellsworth v. Lockwood*, 42 N. Y. 93; *Townsend v. Whitney*, 75 N. Y. 425; *Wildrip v. Black*, 74 Cal. 409; *Lumpkin v. Mills*, 4 Ga. 344 discussing the civil law rule; *Sublett v. McKinney*, 19 Tex. 438, overruled in *Faires v. Cockrell*, 88 Tex. 428, 28 L. R. A. 528.

In the following cases the paying surety was deemed subrogated, in equity at least, to joint securities held directly from the principal.

In many of our states the surety's right to subrogation to judgment and specialty debts or other direct

JUDGMENT DEBTS.

Ldidderdale v. Robinson, 2 Brock (U. S.) 160, 12 Wheat. (U. S.) 594; *Cottrell's Appeal*, 23 Pa. St. 294; *Baily v. Brownfield*, 20 Id. 41; *Wright v. Grover*, 82 Id. 80; *Wilkes v. Vaughan*, 73 Ark. 174; *Bank v. Opera House Co.*, 23 Mont. 34, 75 Am. St. R. 499, 45 L. R. A. 285; *Nelson v. Webster*, 72 Neb. 332, 68 L. R. A. 513, 117 Am. St. R. 799; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; 19 Am. D. 629; *Townsend v. Whitney*, 75 N. Y. 425; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Marsh v. Pike*, 10 Paige Ch. (N. Y.) 595; *Corey v. White*, 3 Barb. (N. Y.) 12, overruling earlier cases; *Tinsley v. Anderson*, 3 Call (Va.) 285; *Davis v. Vass*, 47 W. Va. 811; *Powell's Exrs. v. White*, 11 Leigh (Va.) 309; *McDougal v. Dougherty*, 14 Ga. 674; *Burrows v. McWhann*, 1 Des. (S. Car.) 409, 1 Am. D. 677; *Norwood v. Norwood*, 2 Har. & J. (Md.) 238; *Watkins v. Worthington*, 5 Bland (Md.) 509; *Atwood v. Vincent*, 17 Conn. 575; *Norton v. Soule*, 2 Greenl. (Me.) 341; *Hill v. King*, 48 Oh. St. 75 and cases cited; *Ferguson's Admr. v. Carson's Admr.*, 86 Mo. 673; *Kimmel v. Lowe*, 28 Minn. 265; *German Am. Sav. Bank v. Fritz*, 68 Wis. 390, 397 and cases cited; *Dempsey v. Bush*, 18 Oh. St. 376; *Am. Note to Deering v. Earl of Winchelsea*, 1 Lead Cas. Eq. (4th Am. Ed.) 137, et seq. The surety must assert his equitable right before his legal remedy by implied assumpsit is barred. *Johnson v. Belden*, 49 Ia. 301; *Junker v. Rush*, 136 Ill. 179, 11 L. R. A. 183; *Pollock v. Wright*, 15 S. Dak. 134; *Alleghany Valley R. Co. v. Dickey*, 131 Pa. 86; *Burrus v. Cook*, 215 Mo. 496. *Contra*, *Houston v. Bank of Huntsville*, 25 Ala. 250; *Briley v. Sugg*, 1 Dev. & Bat. Eq. (N. Car.) 366, 30 Am. D. 172; *Fidelity Co. v. Jordan*, 134 N. Car. 236; *Pierson v. Catlin*, 18 Vt. 77; *Ante*, sec. 124, note 41.

SPECIALTY DEBTS.

Mott v. Maris, 2 Wash. C. C. 196; *Turner v. Teague*, 73 Ala. 554; *Lumpkin v. Mills*, 4 Ga. 343; *Davis v. Smith*, 5 Ga. 274, 48 Am. D. 279; *Brought v. Griffith*, 16 Iowa 21; *Grider v. Payne*, 9 Dana (Ky.) 188; *Schoolfield v. Rudd*, 9 B. Mon. (Ky.) 291; *Muldoon v. Crawford*, 14 Bush. (Ky.) 125; *Orem v. Wrightson*, 51 Md. 34, 34 Am. R. 286; *Crisfield v. State*, 55 Md. 192; *Felton v. Bissel*, 25 Minn. 15, 19; *Ferguson v. Carson*, 86 Mo. 673; *Townsend v. Whitney*, 75 N. Y. 425; *Drake v. Coltran*, *Busbee* (N. Car.) 300; *Howell v. Reams*, 73 N. Car. 391, with which compare (*Liles v. Rogers*, 113 N. Car. 196, 200-201); *Burrows v. McWhann*, 1 Des. (S. Car.) 409, 1 Am. D. 677; *Lenoir v. Hunter*, 4 Des. (S. Car.) 65, 6 Am. D. 597; *Pride v. Boyce*, *Rice*, Eq. (S. Car.) 275, 33 Am. D. 78; *Shultz v. Carter*, *Spears*, Eq. (S. Car.) 533; *Thompson v. Palmer*, 3 Rich. Eq. (S. Car.) 139; *Ex parte Ware*, 5 Rich. Eq. (S. Car.) 473; *Eppes v. Randolph*, 2 Call. (Va.) 125; *Tinsley v. Anderson*, 3 Call. (Va.) 329; *Tinsley v. Oliver*, 5 Munt. (Va.) 419;

security is established or confirmed by statutes,⁵⁸ and in England the matter is now governed by the Mercantile Law Amendment Act (19 & 20 Vic., c. 97, sec. 5), the text of which is printed below.⁵⁹

Even where a bond, judgment or other direct security is held extinguished upon payment by the surety, however, securities collateral thereto, as a mortgage or pledge, whether against third persons or their prop-

Enders v. Brune, 4 Rand. (Va.) 438; Powell v. White, 11 Leigh (Va.) 309; Pace v. Pace, 95 Va. 792, 44 L. R. A. 459; Mason v. Pierron, 63 Wis. 239, 244-245. Contra at law, Justices v. Lee, 1 T. B. Monr. (Ky.) 247; Buckner v. Morris, 2 J. J. Marsh. (Ky.) 121; Compare Schoolfield v. Rudd, 9 B. Monr. (Ky.) 291; Bledsoe v. Nixon, 68 N. Car. 520, 523; Buckner v. Morris, 2 J. J. Marsh. (Ky.) 121. And see Cromer v. Cromer's Admrs., 29 Gratt. (Va.) 280, limiting the right to subrogation both at law and in equity to cases where the payment was made after the principal's death, unless there was an assignment of the bond or an agreement to assign.

58. So far as specialty debts are concerned, the question is of diminished importance since the enactment of statutes abolishing the priority of specialty creditors over those by simple contract. See Stat. 32 & 33 Vict. c. 46 and statutes in the several states. The American, English and Canadian legislation on this point down to 1905 is stated and discussed in the elaborate note to Nelson v. Webster, 68 L. R. A. 513, 577 and Frank v. Taylor, 16 L. R. A. 115, 118. See Vandervere v. Ware, 65 Ala. 606; Furman v. Furman, 115 Md. 436, 443 and cases cited.

59. "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt, or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made, and loss sustained by the person who shall have so paid such debt, or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by

erty or against property of the principal debtor are not discharged, and the surety is entitled thereto.⁶⁰

§ 141. Other Direct Securities. The common law rule as to direct securities, however, has been applied in some jurisdictions to simple contracts constituting direct security for the debt, and it has been held that a surety paying or buying in the joint note of himself and principal, was not subrogated to the creditor's remedies under the note, for that, being as much the surety's obligation as the principal's, was extinguished by the payment and the right to indemnity rests solely upon implied contract.⁶¹ The prevailing rule in this country, however, seems to be otherwise, at least in equity.⁶²

§ 142. Same—Payment by Joint Debtor not a Surety. In spite of the modern rule by which the strict surety is entitled to be subrogated to the direct securities of

the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." See *In re Cochran's Estate*, L. R. 5 Eq. 209; *In re M'Myn*, L. R. 33 Ch. Div. 575, *In re Lord Churchill*, L. R. 39 Ch. Div. 174.

60. Ante, sec. 140 and cases cited in note 46. See *Dowbiggen v. Bourne*, 2 Yo. & Coll. (Exch.) 462; *Lumpkin v. Mills*, 4 Ga. 343; *Townsend v. Whitney*, 75 N. Y. 425.

61. *Harrah v. Jacobs*, 75 Ia. 72; *Lamb v. Withrow*, 31 Ia. 164. See also *Geiske v. Johnson*, 115 Ind. 573; *Frevert v. Henry*, 14 Nev. 191; *Pray v. Maine*, 7 Cush. (Mass.) 253; *Kreider v. Isenbice*, 123 Ind. 10; *Preston v. Gould*, 64 Iowa, 44; *Sherwood v. Collier*, 3 Dev. (N. Car.) 380, 24 Am. D. 264 (unless payment is by a stranger who takes an assignment from the creditor as trustee for the surety); *Bledsoe v. Nixon*, 68 N. Car. 521; *Rittenhouse v. Levering*, 6 W. & S. 190; *Faires v. Cockerell*, 88 Tex. 428; overruling earlier cases and reinstating *Holliman v. Rogers*, 6 Tex. 91; *Miller v. Ziegler*, 3 Utah 17. The rule of course does not apply to indorsers or to technical guarantors who are secondarily liable. Payment by them does not extinguish the security even at law and they may sue the makers thereon for indemnity. *Cone v. Eldridge* (Col. App. 1911), 119 P. 616.

62. *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 594; *Wildrip v. Black*, 74 Cal. 409; *Brought v. Griffith*, 16 Ia. 26; *Danker v. Jacobs*, 79 Neb. 431; *Berthold v. Berthold*, 46 Mo. 557; *Brewing Co. v. Jordan*, 110 Mo. App. 286, 290 and cases cited. *Lawrence Co. Bank v. Gray*, 23 Pa. Sup. Ct. 62; *Low v. Blodgett*, 21 N. H. 121. But see *Burrus v. Cook*, 215 Mo. 496.

the creditor from the principal, though jointly or jointly and severally liable with the latter, it is said to be "a proposition everywhere admitted and nowhere denied that if a debt or judgment is owing by two or more persons jointly, each liable primarily or as principals and one of them pays it, such debt or judgment is, at law, absolutely extinguished. The debt is dead; the judgment *functus officio*." ⁶³ It is a rule that cannot be evaded by any arrangement between the parties, or any change in the form of the transaction, or by an assignment to the paying debtor, for the assignment to one of his own debt is an absurdity. ⁶⁴ Not even an assignment to a third person for the use of the paying debtor will prevent the discharge of such debt or judgment, ⁶⁵ and the only remedy of the latter is a proceeding for contribution, whether at law or in equity, upon the footing of a simple contract creditor, ⁶⁶ or a resort to securities purely collateral, held by the creditor from the other co-obligors. This rule has been changed in England ⁶⁷ and by similar legislation in some of our states; and even where no legislative change has been made, the paying debtor is entitled to the benefit of whatever

63. *Preslar v. Stallworth*, 37 Ala. 402; *Bartlett v. McRae*, 4 Ala. 688; and numerous cases cited in 68 L. R. A. 514 note. *Stevens v. Morse*, 7 Me. 36, 20 Am. D. 337, and cases throughout this section.

64. *Stevens v. Morse*, *supra*; *Preslar v. Stallworth*, *supra*, *Sherwood v. Collier*, 14 N. Car. 380, 24 Am. D. 264; *Adams v. Drake*, 11 Cush. (Mass.) 504; *Holmes v. Day*, 108 Mass. 563; *Hammatt v. Wyman*, 9 Mass. 108; *Fitch v. Hammer*, 17 Colo. 591; *Fulton v. Harrington*, 4 Houst. (Del.) 182; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. D. 207; *Hinton v. Obermayer*, 67 N. Car. 406. Compare *Brown v. White*, 5 Dutch. (N. J. L.) 514, 80 Am. D. 226; *Morris v. Evans*, 2 B. Monr. (Ky.) 84, 36 Am. D. 591.

65. *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. D. 236; *Stevens v. Morse*, 7 Me. 36, 20 Am. D. 337; *Henry & Co. v. Halter*, 58 Neb. 685; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Briley v. Sugg*, 21 N. Car. (1 Dev. & B. Eq.) 366, 30 Am. D. 172; *Townsend v. Whitney* 75 N. Y. 425; *Edgerly v. Emerson*, *supra*. As to the effect of the release of one of several co-debtors, see *Post*, secs. 240, 241.

66. *Holmes v. Day*, 108 Mass. 563; *Greniers Estate*, 2 Watts (Pa.) 414.

67. Stat. 19, 20 Vict. c. 97, sec. 5 quoted in note 59, sec. 140.

strictly collateral securities the creditor has taken or obtained from his co-obligors.⁶⁸ It has furthermore been held that where parties are jointly bound as principals at the outset, but by arrangement between them one of them becomes the principal and the others sureties merely, the latter will have full rights of subrogation.⁶⁹

§ 143, How Right of Subrogation Under Judgment or Specialty Enforced—Subrogation to Judgment Lien.

In many states it is held that the surety paying a joint judgment or other direct obligation of himself and principal is deemed immediately subrogated in equity to all rights of the creditor thereunder against the principal debtor for indemnity, and his co-obligors for contribution, without any formal assignment, upon the ground that equity regards that done which ought to be done.⁷⁰ In others it is held that he must take or compel a formal assignment of the judgment or other security, or proceed in equity to compel it, whereupon he may proceed to enforce his rights thereunder by bill or petition.⁷¹

Where the surety becomes subrogated to a judgment, however, he becomes subrogated to the lien thereof up-

68. *Pratt v. Law*, 9 Cranch (U. S.) 456; *Truss v. Miller*, 116 Ala. 494; *Wheatley v. Calhoun*, 12 Leigh (Va.) 264; 37 Am. Dec. 654; *Tompkins v. Mitchell*, 2 Rand (Va.) 428.

69. *Shinn v. Shinn*, 91 Ill. 477; *Crafts v. Mott*, 4 N. Y. 603; *Wheeler's Est.*, 1 Md. Ch. Dec. 80; *Butler v. Birkey*, 13 Oh. St. 514.

70. *Hill v. King*, 48 Oh. St. 75; *Lumpkin v. Mills*, 4 Ga. 343; *Fleming v. Beaver*, 2 Rawle, (Pa.) 128, 19 Am. D. 629; *Kenard v. Bird*, 20 S. Car. 377; *Lightbown v. McMyn*, L. R. 33 Ch. Div. 575. See *Burrus v. Cooke*, 215 Mo. 496; *Manford v. Frith*, 68 Ind. 83.

By statute in a number of states or with equitable aid, a surety subrogated to a judgment against his principal or co-surety may have execution thereon, at least after his suretyship is judicially established. *Furman v. Furman*, 115 Md. 436, 442; *Patterson v. Clark*, 101 Ga. 214; *Zimmerman v. Gaumer*, 152 Ind. 552.

That the right in some states, must be enforced in equity before the legal remedy is barred, see *Ante*, sec. 140 and cases cited in note 57. *Ante*, sec. 124 and note 41.

71. See *Perkins v. Kershaw*, 1 Hill Ch. (S. Car.) 344; *Junker v. Rush*, 136 Ill. 179, 11 L. R. A. 183; *Burrus v. Cook*, 215 Mo. 496, 509; *Martindale v. Brock*, 41 Md. 571; *Chollar v. Temple*, 39 Ark. 238; *Zimmerman v. Gaumer*, 152 Ind. 552.

on the lands of the principal and those of any co-sureties from whom he is entitled to contribution who are parties thereto.⁷² This subrogation will prevail against a grantee of the principal or co-surety by a conveyance subsequent to the judgment, but prior to payment by the surety⁷³ and a fortiori against an intermediate judgment or attaching creditor.⁷⁴

§ 144. Subrogation to Vendor's Lien for Purchase Money. In states where the vendor's equitable lien for purchase money exists, the surety of a vendee is entitled to be subrogated, upon paying the purchase price, to the vendor's right as an equitable mortgagee.⁷⁵ Where the vendor's equitable lien is not recognized, there is, of course, nothing to which the surety can be subrogated.⁷⁶

72. *Bragg v. Patterson*, 85 Ala. 233; *Hardcastle v. Comm. Bank*, 1 Harringt. (Del.) 374; *Chandler v. Higgins*, 109 Ill. 602; *Johnston v. Belden*, 49 Ia. 301; *Hollingsworth v. Pearson*, 53 Iowa 53; *Searing v. Berry*, 58 Iowa 20; *Furnold v. Bank*, 44 Mo. 336; *Beune v. Schnecko*, 100 Mo. 250; *Harper v. Rosenberger*, 56 Mo. App. 388; *Harper v. Kemble*, 65 Mo. App. 514; *Cauthorn v. Berry*, 69 Mo. App. 404; *Smith v. Rumsey*, 33 Mich. 183; *Dempsey v. Bush*, 18 Oh. St. 376; *Scott's App.*, 88 Pa. 173; *Ward's Est.*, 100 Pa. 289; *Boltz's Est.*, 133 Pa. 77; *King v. Aughtry*, 3 Strob. Eq. (S. Car.) 149; *Mason v. Pierron*, 63 Wis. 239, 69 Wis. 585; *German Am. Bank v. Fritz*, 68 Wis. 390; *Murray v. Meade*, 5 Wash. 693 under Code (1893), sec. 760.

73. *Peirce v. Higgins*, 101 Ind. 178; *Hill v. King*, 48 Oh. St. 75; *Dempsey v. Bush*, 18 Oh. St. 376; *Garvin v. Garvin*, 27 S. Car. 472; *McClung v. Beirne*, 10 Leigh (Va.) 394; 34 Am. Dec. 739; *Buchanan v. Clark*, 10 Gratt. (Va.) 164.

74. *Manford v. Firth*, 68 Ind. 83; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; (co-surety) *Watt v. Kinney*, 3 Leigh (Va.) 272, 23 Am. Dec. 266. Compare *Thomas v. Stewart*, 117 Ind. 50, 1 L. R. A. 715.

75. *Nottingham Build & Loan Co. v. Thurstan*, 1903 App. Cas. 6; *Uzzell v. Mack*, 4 Flumph. (Tenn.) 319, 40 Am. D. 648; *Ellis v. Roscoe*, 4 Baxt. (Tenn.) 418; *Carter v. Sims*, 2 Heisk. (Tenn.) 166; *McNeill v. McNeill*, 36 Ala. 109, 76 Am. D. 320; *Ballew v. Roler*, 124 Ind. 557, 9 L. R. A. 481; *Stenhouse v. Davis*, 82 N. Car. 432; *Deitzler v. Mishler*, 37 Pa. St. 82; *Knickerbocker Tr. Co. v. Cartaret Steel Co.*, 79 N. J. Eq. 501; *Sheldon*, Subr. sec. 97. See *Sawyers v. Baker*, 72 Ala. 49, 55. Compare *Woodward v. Cleggs*, 8 Ala. 317.

76. *Miller v. Miller*, Phillips' Eq. (N. Car.) 85; *Bradford v. Morris*, 2 Fla. 463; *Blake v. Coons*, 71 Ia. 356.

If property is sold, the title to remain in the vendor until the price is paid, the vendor is regarded as in the attitude of a mortgagee, and if a surety for the vendee pays the debt, he will be subrogated to the vendor's rights as such.⁷⁷

§ 145. Miscellaneous Liens, Remedies and Securities. A surety for a subscriber for corporate stock is entitled to subrogation to the lien of the corporation on such stock, upon paying the subscription price for his principal,⁷⁸ and so, similarly, as to liens of the corporation for the debts due from the stockholder,⁷⁹ and a surety for rent is entitled to the benefit of the landlord's agricultural lien as against the tenant.⁸⁰

Where a third person knowingly participates or aids in the commission of a breach of trust by the principal, so that he would be answerable to the creditor therefor, the surety who discharges the principal's liability will be subrogated to the rights of the creditor as against such third person.⁸¹

§ 146. Subrogation to Priorities of Creditor. It is gen-

77. *Beattie v. Dickinson*, 39 Ark. 205; *Keith v. Hudson*, 74 Ind. 333; *Bellew v. Roler*, 124 Ind. 557, 9 L. R. A. 481; *Kleiser v. Scott*, 6 Dana, (Ky.) 138; *Burk v. Chrisman*, 3 B. Monr. (Ky.) 50; *Highland v. Anderson*, (Kentucky, 1891), 17 S. W. R. 866; *Ghiselin v. Ferguson*, 4 Har. & J. (Md.) 522; *Magruder v. Peter*, 11 Gill & J., (Md.) 217; *Tuck v. Calvert*, 33 Md. 209; *Myres v. Yaple*, 60 Mich. 339; *Torp v. Gulseth*, 37 Minn. 135; *Smith v. Schneider*, 23 Mo. 447; *Green v. Crockett*, 2 Dev. & B. Eq. (N. Car.) 390; *Polk v. Gallant*, 2 Dev. & B. Eq. (N. C.) 395; 34 Am. D. 410; *Schoffner v. Foglenan*, Winst. Eq. (N. Car.) 12; *Arnold v. Hicks*, 3 Ired. Eq. (N. Car.) 17; *Barnes v. Morris*, 4 Ired. Eq. 22; *Egerton v. Alley*, 6 Ired. Eq. 188; *Ex parte Pettillo*, 80 N. Car. 50; *Stenhouse v. Davis*, 82 N. Car. 432; *Deitzler v. Mishler*, 37 Pa. 82; *Henry v. Compton*, 2 Head. (Tenn.) 549; *Galliher v. Galliher*, 10 Lea, (Tenn.) 23; *Hatcher v. Hatcher*, 1 Rand. (Va.) 53.

78. *Klopp v. Lebanon Bank*, 46 Pa. 88.

79. *Young v. Vough*, 23 N. J. Eq. (8 C. E. Green) 325.

80. *Smith v. Wells*, 67 Ky. (4 Bush) 92.

81. *American Bonding Co. v. National etc. Bank*, 97 Md. 598, 99 Am. St. R. 466; *Skipworth v. Hurt*, 94 Tex. 322; *American Nat. Bank v. Fidelity etc. Co.*, 129 Ga. 126; *National Surety Co. v. State Savings Bank*, 156 Fed. 21, 84 C. C. A. 87.

erally held that a surety paying the debt of his principal is subrogated to the same liens, privileges and priorities as the creditor had as against the principal debtor. Thus a surety for a debtor to the crown has been held entitled to the priorities of the crown in the administration of the principal's estate;⁸² and sureties on a custom house bond have been held entitled in this country to the priorities of the government, upon payment by them, against the principal or his estate.⁸³

§ 147. Loss or Surrender of Securities as Release of Surety. The loss or the surrender without the consent of the surety of securities held by the creditor from the principal will commonly release the surety, at least to the extent of their value. The principles governing this subject are stated elsewhere.⁸⁴

§ 148. Assignment of Surety's Rights. A surety paying the debt of his principal, and thus acquiring the right of subrogation, may assign his demand and equitable claim against the principal, and his assigns will be subrogated to the rights of the creditor and may take his place, with all the securities, rights, remedies, privileges and priorities.⁸⁵

82. *In re Lord Churchill*, L. R. 39 Ch. Div. 174; *Lewis v. U. S. Fid. & Guar. Co.*, 144 Ky. 425, Ann. Cas. 1913 A. 564.

83. *U. S. v. Hunter*, 5 Mason (U. S.) 62; *Reed v. Emory*, 1 Sarg. & R. (Pa.) 339; *Enders v. Brune*, 4 Rand. (Va.) 438; *Pond v. Dougherty*, 6 Cal. App. 686; *Orem v. Wrightson*, 51 Md. 34, 34 Am. R. 286. Sureties on a state treasurer's bond are entitled to the preference of the state upon repaying the shortage of their principal. *Whitbeck v. Ramsay*, 74 Ill. App. 524; with which compare *Ramsay v. Whitbeck*, 183 Ill. 550. See also *Robertson v. Trigg*, 32 Gratt. (Va.) 76. See generally, *Zimmerman v. Chelsea Sav. Bank*, 161 Mich. 691, and cases cited. Sureties on a treasurer's bond who pay are entitled to subrogation to the state's exemption from the plea of the statute of limitations. *Am. Bonding Co. v. Nat. etc. Bank*, 97 Md. 598, and cases cited in the opinion and in the note thereto in 99 Am. St. R. 466.

84. Post, secs. 245 et seq.

85. *Pierce v. Garrett*, 65 Ill. App. 682 citing *Harris on Subrogation* sec. 199; *Frank v. Taylor*, 130 Ind. 145, 16 L. R. A. 115; *Manford v. Freth*, 68 Ind. 83; See also *San Francisco Sav. Union v. Long*, 123 Cal. 107; *Wright v. Talbot*, 56 W. Va. 257.

CHAPTER XIII.

CO-SURETIES AND CONTRIBUTION BETWEEN CO-SURETIES.

§ 149. **General Nature of the Right of Contribution in Equity and at Law.** Contribution, or rather the right to contribution, arises where one of several parties who are liable in the same rank for the same debt or obligation discharges it, or more than his just proportion of it, for the benefit of all of them, and signifies his right to receive and the duty of the others to pay, such sums as will make the burdens equal.¹ The basis of the right is not contract, strictly speaking, though it may be modified or controlled by contract,² but the general principles of justice and equity, and it is founded upon and exemplifies the familiar maxim that equality is equity.³ Indeed the equitable nature of the doctrine of contribution may be illustrated by reference to a sort of involuntary suretyship, if the term may be permitted. Thus where

1. See Bisph. Eq. (8th Ed.), sec. 328; 3 Pom. Eq. Jur., sec. 1418.

2. Swain v. Wall, 1 Ch. Ca. 246; Post, sec. 157.

3. Deering v. Earl of Winchelsea, 1 Cox 318, 2 B. & P. 270, 1 Lead. Cas. Eq. 100; Whiting v. Burke, L. R. 10 Eq. 539, 6 Ch. 342; Yonge v. Reynell, 9 Hare 809; Stirling v. Forester, 3 Bligh 575; McMahon v. Fawcett, 2 Rand. (Kan.) 514; Moore v. Moore, 4 Hawks. (N. Car.) 358, 360, 15 Am. D. 523-n; Moore v. Isley, 2 Dev. & Bat. Eq. 372; Allen v. Wood, 3 Ired. Eq. 386; Screven v. Joyner, 1 Hill Eq. (S. C.) 252; McKenna v. George, 2 Rich. Eq. (S. Car.) 15; Breckenridge v. Taylor, 5 Dana (Ky.) 110; Mills v. Hyde, 19 Vt. 59, 46 Am. D. 177; United States Fid. & Guar. Co. v. McGinnis, 147 Ky. 781, 789, and cases cited; Strong v. Mitchell, Id. 644; Craig v. Ankeney, 4 Gill (Md.) 225; Campbell v. Mesier, 4 Johns. Ch. 334, 6 Id. 21; Dillenbeck v. Dygert, 97 N. Y. 305, 49 Am. R. 525; Id. 21; Bailey's Est., 156 Pa. 634; Van Winkle v. Johnson, 11 Oreg. 469, 50 Am. Rep. 495; Eads v. Retherford, 114 Ind. 273, 5 Am. St. R. 611; Hendrick v. Whitmore, 105 Mass. 23; Chipman v. Morrill, 20 Cal. 130; Gross v. Davis, 87 Tenn. 226, 10 Am. St. R. 635, 639 and note; In re Koch's Est., 148 Wis. 548, and cases throughout this section. For the history of the right and a valuable review of the English cases, see Wolmershausen v. Gullick, L. R. (1893), 2 Ch. 514.

the common agent of several principals acting in breach of his trust, validly pledged the property or securities of all of them to secure his own debt, it was held that the one whose property was thereby subjected to the discharge of such debt was entitled to contribution from the others in proportion to the value of the several interests so pledged.⁴

Though the principle of contribution has its most frequent and important application to cases of suretyship, it is applicable, in general, to all cases where two or more parties are liable in common for a debt or charge. Originally enforceable solely in equity,⁵ the common law courts subsequently administered the same or similar relief through the medium of an implied assumpsit, based upon the presumed understanding of the parties.⁶ This remedy, however, is in many cases inadequate or inconvenient. The present status of the remedy, together with the occasional advantages of the equitable over the legal jurisdiction, are well stated by Mr. Bispham, who says:⁷ "At law separate actions would have to be brought against each co-surety; whereas, in equity, all of the co-sureties could be made liable in the same bill, and the rights of sureties as against the principal could

4. *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. R. 265, and cases cited.

5. *Brown v. Lee*, 6 B. & C. 697; note to *Deering v. Earl of Winchelsea*, in 1 Lead. Cas. Eq. 100; *Wormleighton & Hunter's Case*, Godbolt, 243; *Robinson's Exrs. v. Kenon's Exrs.*, 3 N. Car. 181.

6. *Craythorne v. Swinburne*, 14 Ves. 164; *Davies v. Humphreys*, 6 M. & W. 153; *Kemp v. Finden*, 12 M. & W. 421; *Lansdale's Admrs. v. Cox*, 7 T. B. Monr. (Ky.) 401; *White v. Banks*, 21 Ala. 705, 56 Am. D. 283; *Bezzell v. White*, 13 Ala. 422; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. D. 497; *Agnew v. Bell*, 4 Watts (Pa.) 31; *Mason v. Lord*, 20 Pick. (Mass.) 447; *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555, 559; *Warner v. Morrison*, 3 Allen (Mass.) 566; *Chipman v. Morrill*, 20 Cal. 131; *Bushnell v. Bushnell*, 47 Wis. 435. In North Carolina the right to contribution at law is founded on statute. (1 R. S. N. Car. 113, sec. 2.) *Powell v. Matthis*, 4 Ired. (N. Car.) 83, 40 Am. D. 427.

7. Bisph. Eq. (8th Ed.), sec. 329.

be adjusted in the same action.⁸ Hence it has been held that the complexity of an agreement, and the multiplicity of suits and the successive sets of suits to which it might give rise at law, are grounds upon which a Court of Chancery might properly entertain a bill for the adjustment of the contributions called for by the agreement in one suit.⁹ At law the co-surety was compellable to contribute only his pro rata proportion, having regard to the whole number of sureties, without reference to the fact that some one or more of them might be insolvent [or nonresident];¹⁰ whereas, in equity, the burden of the debt is divided among the solvent [resident] sureties, and the party paying recovers from each of the others an amount dependent upon the number of those who are actually able to pay,"¹¹ though generally

8. See *Craythorne v. Swinburne*, 14 Ves. Jr. 160. See also, *Black v. Shreeve*, 7 N. J. Eq. (3 Halst.) 440; *Sloo Adm'r v. Pool*, 15 Ill. 47; *Cowell v. Edwards*, 2 Bos. & P. 268; *Powell v. Matthis*, 4 Ired. L. (N. Car.) 83, 40 Am. D. 427. In *Chipman v. Morrill*, 20 Cal. 130 where three parties purchased property and gave their joint note for the whole purchase price, each taking a distinct but undivided interest, and one of them paid the whole note, it was held in an action at law, that his remedy was not against both the other two signers jointly for contribution, but severally against each individually for indemnity for his proportionate share of the debt. This was upon the theory that each was a principal as to his own proportion of the debt and a co-surety with the other two for their proportions thereof. See also, *Lindell v. Brant*, 17 Mo. 150, and cases cited; *Parker v. Ellis*, 2 Sandf. (N. Y. Super Ct.) 223, and cases cited, with which compare *Wright v. Post*, 3 Conn. 142; *Chandler v. Brainerd*, 14 Pick. (Mass.) 285; *Easterly v. Barber*, 66 N. Y. 433, 439.

9. *Black v. Shreeve*, 7 N. J. Eq. (3 Halst.) 457; *Dysart v. Crow*, 170 Mo. 275.

10. *Brown v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268; *Brown v. Lee*, 6 B. & C. 697; *Sherrod v. Rhodes*, 5 Ala. 683; *Sloo v. Pool*, 15 Ill. 47, 48; *Griffin v. Kelleher*, 132 Mass. 82, and authorities cited; *Dodd v. Wynn*, 27 Mo. 501; *Parker v. Ellis*, 2 Sandf. (N. Y.) 223; *Fischer v. Gathier*, 32 Oreg. 161; *Easterly v. Barber*, 66 N. Y. 433, and authorities cited.

11. 1 Story's Eq., sec. 496; *Peter v. Rich.*, 1 Rep. in Ch. 34; *Hole v. Harrison*, 1 Ch. Ca. 246; *Lowe v. Dixon*, 29 Q. B. D. 455; *Deering v. Winchelsea*, 1 Conx. Ch. 318, 2 B. & P. 270, 1 Lead. Cas. in Eq. 100; *Burrows v. McWhann*, 1 Des. (S. Car.) 409, 1 Am. D. 677; *Breckenridge v. Taylor*, 5 Dana. (Ky.) 110; *Hitchman v. Stewart*, 3 Drew.

now, at least in the code states the rules of equity as to insolvent and nonresident sureties apply in actions at law.¹² At law, contribution could not, by some authorities, have been enforced against the representatives of a deceased surety; but in equity the rule is otherwise.¹³ It is therefore well settled that the jurisdiction of chancery in matters of contribution still remains in spite of the jurisdiction at law.¹⁴ The legal remedy by *assumpsit*, however, at least in some jurisdictions, appears to have at least one advantage over an equitable suit, and that lies in the fact that it is has been held in equity that co-sureties may be sued for contribution only after the surety paying has exhausted his legal remedy against the principal, or shown his insolvency,¹⁵ whereas

(Fla.) 271; *McAllester v. Irwin*, 31 Col. 255; *Burroughs v. Lott*, 19 Cal. 125; *Smith v. Mason*, 44 Neb. 610; *Potts v. Dulin*, 125 N. Car. 413; *Fischer v. Gathier*, *supra*; *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. R. 559; *Boutin v. Etsell*, 110 Wis. 276; *McDavid v. McLean*, 202 Ill. 354; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635, and note at p. 641. Non-residence of a surety has the same effect upon the rights and liabilities of the remaining sureties as insolvency. *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Liddell v. Wiswell*, 59 Vt. 365; *Security Ins. Co. v. St. Paul F. & M. Ins. Co.*, 50 Conn. 233, (applying the rule to foreign corporations.) *Bosley v. Taylor*, 5 Dana (Ky.) 157, 30 Am. D. 677; *Whitman v. Porter*, 107 Mass. 522; *Boardman v. Paige*, 11 N. H. 431; *Faurot v. Gates*, 86 Wis. 569.

12. *Michael v. Allbright*, 126 Ind. 172; *Van Patten v. Richardson*, 68 Mo. 379, and authorities cited; *Faurot v. Gates*, *supra*; *Boutin v. Etsell*, *supra*, and authorities cited therein. And so in England under the Judicature Acts, 36 & 37 Vict., c. 66, sec. 25 (11). *Lowe v. Dixon*, 16 Q. B. D. 455, 458. See also, *Hudson v. Aman*, 158 N. Car. 429.

13. Post, sec. 164.

14. In *re Koch's Est.*, 148 Wis. 548, 557, and cases cited; *Wayland v. Tucker*, 4 Gratt. (Va.) 267, 50 Am. D. 76; *Couch v. Terry*, 12 Ala. 225; *Chipman v. Morrill*, 20 Cal. 130, 135, and cases cited; *Wright v. Hunter*, 5 Ves. 792; *Dysart v. Crow*, 170 Mo. 275, 281, 282, and authorities cited. Equity has jurisdiction where the estate of a deceased surety was settled before a cause of action for contribution arose on his bond, to enforce contribution out of lands held by his heirs. *Hall v. Cole*, 71 Ark. 601.

15. *Rainey v. Yarborough*, 37 N. Car. 249, 38 Am. D. 681; *Stone v. Buckner*, 20 Miss. (12 S. & M.) 73; *Bolling v. Doneghy*, 2 Duv. (Ky.) 220; *McCormack v. O'Bannon*, 3 Munf. (Va.) 485, 5 Am. D. 509. See *Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. R. 669; *Glasscock v. Hamil-*

at law it is sufficient to show that the plaintiff has discharged more than his just share of the common burden.¹⁶

It should also be noted that the surety's right of action at law arises not merely when he has paid the whole debt, but the moment he has paid any part beyond his equitable proportion thereof.¹⁷ and his right to sue for contribution is not dependent upon notice of such payment or demand upon the co-surety for his contributive share.¹⁸

§ 150. Who Entitled to Contribution—Co-Sureties—Parol Evidence. In order that a surety may have contribution from others liable for the same debt, they

ton, 62 Tex. 143. *Jackson v. Murray*, 77 Tex. 644. Compare *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. R. 728. That insolvency of the principal need not be shown where he is made a party to the bill, see *Lawson v. Wright*, 2 Cox Ch. 275.

16. *Roberts v. Adams*, 6 Port. (Ala.) 361, 31 Am. D. 694; *Buckner v. Stewart*, 34 Ala. 529; *Taylor v. Reynolds*, 53 Cal. 686; *Sloo v. Pool*, 15 Ill. 47; *Judah v. Misure*, 5 Blackf. (Ind.) 171; *Rankin v. Collins*, 50 Ind. 158; *Goodall v. Wentworth*, 20 Me. 322; *Mosely v. Fullerton*, 59 Mo. App. 143; *Smith v. Mason*, 44 Neb. 610; *Odlin v. Greenleaf*, 3 N. H. 270; *Lucas v. Guy*, 2 Bail. (S. Car.) 403. But see contra, *Pearson v. Duckham*, 3 Litt. (Ky.) 385; *Morrison v. Poyntz*, 7 Dana (Ky.) 307, 32 Am. D. 92; *Lee v. Forman*, 3 Met. (Ky.) 114; *Bolling v. Doneghy*, 1 Duv. (Ky.) 220; *Glasscock v. Hamilton*, 62 Tex. 143, and compare *Leak v. Covington*, 99 N. Car. 559; *Cage v. Foster*, 5 Yearg. (Tenn.) 261, 264, 26 Am. D. 265, and see the comments on the Kentucky cases in *Taylor v. Reynolds*, 53 Cal. 686, and *Roberts v. Adams*, 6 Ala. 361.

17. *Ex parte Snowdon*, 17 Ch. D. 44; *Davies v. Humphreys*, 6 Mees. & W. 153; *Durbin v. Kuney*, 19 Oreg. 71; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411-n; *Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. R. 669; *Bonham v. Galloway*, 13 Ill. 68; *Mills v. Hyde*, 19 Vt. 59; *Post*, sec. 165.

18. *Taylor v. Reynolds*, 53 Cal. 686; *Wood v. Perry*, 9 Iowa 479; *Morrison v. Poyntz*, 7 Dana (Ky.) 307, 32 Am. D. 92; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Vliet v. Wyckoff*, 42 N. J. Eq. 644; *Sherrod v. Woodard*, 4 Dev. (N. Car.) 360, 25 Am. D. 714; *Parham v. Green*, 64 N. Car. 436; *Cage v. Foster*, 5 Yerg. (Tenn.) 261, 26 Am. D. 265, (principal being insolvent); *Foster v. Johnson*, 5 Vt. 60; *Mason v. Pierron*, 69 Wis. 585. Contra, *Williams v. Williams*, 5 Oh. 444; *Carpenter v. Kelley*, 9 Oh. 106. See *Neilson v. Fry*, 16 Oh. St. 552, 91 Am. D. 110.

must be legally co-sureties with him.¹⁹ Before going further, however, it should be noted that parol evidence is ordinarily admissible to show, not merely that a party is a surety rather than a principal,²⁰ but the relations of the parties (whether principals or sureties), inter se. This is not varying a written contract of suretyship for such contract is with the creditor and not among the promisors themselves.²¹

That sureties are bound by different instruments executed at different times does not affect the right of contribution, provided they are bound for the same principal and the same debt and really occupy as to each other the position of co-sureties,²² nor does it affect

19. *Kellar v. Williams*, 10 Bush. (Ky.) 216, and cases throughout this and the next two sections.

The fact that one of the sureties is compensated and the other is not, does not militate against the right of the former to have contribution of the latter. *United States Fid. & Guar. Co. v. McGinnis*, 147 Ky. 781. See also, *Gibson v. Shehan*, 5 App. D. C. 391.

20. Ante, sec. 2.

21. Ante, sec. 2; *Craythorne v. Swinburne*, 14 Ves. Jr. 160; *Barry v. Ransom*, 12 N. Y. 462; *Apgar v. Hiler*, 4 Zab. (N. J.) 808; *Hendrick v. Whittemore*, 105 Mass. 23; *Robertson v. Deatherage* 82 Ill. 511; *Clapp v. Rice*, 13 Gray (Mass.) 403, 74 Am. D. 639; *Chapeze v. Young*, 87 Ky. 476. See also, *McGee v. Prouty*, 9 Met. (Mass.) 547, 43 Am. D. 409. See Post, sec. 153, as to successive indorsers in blank.

22. *Deering v. Earl of Winchelsea*, 1 Cox. 318, 2 B. & P. 270; *Whiting v. Burke*, L. R. 6 Ch. 341; *Snow v. Brown*, 100 Ga. 117; *Wells v. Miller*, 66 N. Y. 255; *Armitage v. Pulver*, 37 N. Y. 494; *Breckenridge v. Taylor*, 5 Dana (Ky.) 110; *Robinson v. Boyd*, 60 Oh. St. 67; *Warner v. Morrison*, 3 Allen (Mass.) 566; *Rudolf v. Malone*, 104 Wis. 470; *Powell v. Powell*, 48 Cal. 235; *Cherry v. Wilson*, 78 N. Car. 164; *Golsen v. Brand*, 75 Ill. 148.

In *Deering v. Winchelsea*, supra, the leading case on this subject, it was held that if A B and C become bound as sureties for D in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are bound to contribute in proportion to the penalties of their respective bonds. The Lord Chief Baron Eyre said: "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burden. They are bound as effectually *quoad* contri-

the right that the surety seeking contribution, or from whom it is sought, signed without knowledge that the others were, or would become, bound as sureties with him.²³

The fact that parties are bound for the same principal to the same creditor or obligee, however, does not render them co-sureties if they are really bound for different debts or obligations;²⁴ and where sureties are bound by different instruments for distinct portions of a debt due from the same principal, and the suretyship

bution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally. In this case Sir E. Deering, Lord Winchelsea, and Sir F. Rous were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are in *aequali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person." See also, 70 Am. St. R., p. 444, note.

23. 1 Brandt Guar. & Sur. (3rd Ed.), sec. 284; Craythorne v. Swinburne, 14 Ves. 160; Chaffee v. Jones, 19 Pick. (Mass.) 260; Warner v. Morrison, 3 Allen (Mass.) 566; Monson v. Drakeley, 40 Conn. 552, 16 Am. R. 74; Whitehouse v. Hanson, 42 N. H. 9; Golsen v. Brand, 75 Ill. 148 and authorities cited. To similar effect, see Norton v. Coons, 3 Denio 130. See also, Warner v. Price, 3 Wend. (N. Y.) 397; McNeil v. Sanford, 3 B. Monr. (Ky.) 11; Beaman v. Blanchard, 4 Wend. (N. Y.) 432. Compare Hunt v. Chambliss, 7 Smedes & Mar. (Miss.) 532; Bobbitt v. Shryer, 70 Ind. 513. But where two parties signed apparently as principals, though one of them was a surety, and the latter procured a third person to sign as surety believing that both the prior signers were principals, they were both regarded as principals as to him. Sherman v. Black, 49 Vt. 198; Bobbitt v. Shryer, supra; Melms v. Werdehoff, 14 Wis. 18; Keith v. Goodwin, 31 Vt. 268, 73 Am. D. 345-n. Contra Whitehouse v. Hanson, 42 N. H. 9 (semble).

24. As to parties who are sureties on an administrator's or guardian's general bond and others liable on his special or sale bond, see Post, sec. 332.

of each is a separate and distinct transaction, there is no right of contribution between them.²⁵

One who signs as surety in a private transaction may ordinarily qualify his liability as he pleases, and where, after a principal and surety had signed a note, the defendant signed his name adding, "surety for the above parties," he was held not liable for contribution.²⁶

§ 151. Is Surety Entitled to Contribution From Co-Surety who Became Bound at his Request? Upon this question the authorities are discordant and to some extent obscure. Where there is nothing to disclose the relations of the parties beyond a mere request, it seems to be the better opinion that contribution may still be claimed by the surety at whose request the co-surety signed.²⁷

A number of cases appear to lay down a contrary rule and hold that the surety at whose request another signs as co-surety, cannot have contribution but is bound to indemnify the latter against loss,²⁸ though it is said

25. *Coope v. Twynan*, Turn. & Russ. 426. But if the parties intend to be bound as sureties for the same debt or obligation, though the penalty of each undertaking is less than the whole liability, they are nevertheless entitled to contribution. *Deering v. Winchelsea*, 2 Bos. & P. 270. And though the ultimate amount for which each signer of a common suretyship obligation is to be bound be limited to a certain sum, each may still be a surety for the whole debt up to that limit and hence entitled to contribution, provided the amount he pays within the limit set by his contract is more than his just proportion of the principal's liability. See *Ellis v. Emmanuel*, 1 Exch. Div. 157, and Post, sec. 156 and cases cited in note 63.

26. *Harris v. Warner*, 13 Wend. (N. Y.) 400. To similar effect, see *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Sayles v. Sims*, 73 N. Y. 551; *Robertson v. Deatherage*, 82 Ill. 511; Post, sec. 152, and cases in note 31.

27. *Baggott v. Mullen*, 32 Ind. 332, 2 Am. R. 351; *Burnett v. Millsaps*, 59 Miss. 333; *McKee v. Campbell*, 37 Mich. 497; *Chappell v. John*, 45 Cal. 45, 132 Am. St. R. 134, citing *Bishop v. Smith*, N. J. (1904), 57 Atl. 874. See *Beaman v. Blanchard*, 4 Wend. (N. Y.) 432; *Martin v. Marshall*, 60 Vt. 321.

28. See *Turner v. Davis*, 2 Esp. 497; *Pickering v. Marsh*, 7 N. H. 192; *Cutter v. Emery*, 37 N. H. 567, 575. See also, *Taylor v. Savage*, 12 Mass. 102; *Blake v. Cole*, 22 Pick. (Mass.) 101; *Hendrick v.*

that in most of these cases there was something beyond the mere request by one surety to the other to become bound with him; either the taking of security from the principal by the first surety, or a written or verbal promise to indemnify the surety against whom contribution was claimed, or a direct personal benefit to the surety who requested the defendant to sign.²⁹

§ 152. Successive Sureties—Surety for a Surety. But though two or more parties are bound for the same debt of the same principal, their rights may not be equal. If their liability is “separate and successive rather than joint and co-ordinate, so that all stand *in aequali jure* in regard to the debt for which they are respectively liable”, there is no contribution between them.³⁰ Thus, if one becomes surety for prior sureties as well as for the principal, he is not liable for contribution, but may, upon paying the debt, have full indemnity from the principal or the prior sureties.³¹

Whittemore, 105 Mass. 23; Byers v. McClanahan, 6 Gil. & J. (Md.) 250; Post, sec. 157; Baxter v. Moore, 5 Leigh (Va.) 219; Daniel v. Ballard, 2 Dana (Ky.) 296.

29. See McKee v. Campbell, 27 Mich. 497; Baggott v. Mullen, 32 Ind. 332, 2 Am. R. 351, reviewing the authorities; Turner v. Davis, 2 Esp. 497; Thomas v. Cook, 8 B. & C. 728; Apgar v. Hiler, 4 Zab. (N. J.) 812; Burnett v. Millsaps, 59 Miss. 333, 337; Post, sec. 157, and cases cited. Where a party signs as surety a note signed by others whom he has a right to regard as joint principals, he is not liable to contribute to one of them who claims to be a surety. Turner v. Overall (Tenn. Ch. App.), 39 S. W. 756; Ante, sec. 150, note 23.

30. See Stout v. Fenno, 6 Allen (Mass.) 579, and cases cited in the next note below.

31. Craythorne v. Swinburne, 14 Ves. Jr. 160; Harris v. Warner, 13 Wend. (N. Y.) 400; Wells v. Miller, 66 N. Y. 255; Sayers v. Ross, 15 Ind. 130; M'Donald v. Macgruder, 3 Pet. (U. S.) 470; Whitman v. Gaddie, 7 B. Monr. (Ky.) 591; Hartwell v. Smith, 15 Oh. St. 200; Harrison v. Lane, 5 Leigh (Va.) 414, 27 Am. D. 607. See Stout v. Vause, 1 Rob. (Va.) 179; Keith v. Goodwin, 31 Vt. 268, 73 Am. D. 345; Robertson v. Deatherage, 82 Ill. 511. In Harrison v. Lane, supra, it was agreed between the obligee and sureties on a second bond for the same liability against whom contribution was sought, that the obligee would not execute them so long as the sureties on a prior bond were residents of the state and it should appear that he could be completely indemnified without resorting to the sure-

In legal proceedings against the principal, however, successive sureties upon separate undertakings to stay or prevent collection of the debt are not liable for contribution, but must, in the absence of special agreement, exonerate one another in the inverse order of their signing,³² and so as between the sureties on the original obligation and sureties in legal proceedings to stay or prevent collection from the principal.³³ The rule is doubtless different, however, where the proceeding is against both the principal and his original sureties, and a surety on an appeal or stay bond who signed at the express or implied request of all the defendants, sureties as well as principal, will be entitled to indemnity from them.³⁴ It should be noted, however, that though the sureties on the last appeal bond are primarily liable, if they have paid the whole penalty of their undertaking to the obligee, and a balance by way of damages and costs still remains unsatisfied, the sureties on a prior appeal bond are liable for the balance, and cannot claim indemnity from the sureties on the last bond, for that has been discharged, and there is nothing due the obligee

ties on the second bond. Held, that the sureties on the second bond were not liable for contribution to sureties on the first. To the same effect is *Glenn v. Wallace*, 4 Strob. Eq. (S. Car.) 149.

Where a note was signed by three and the last signer wrote the word "surety" after his name, he was *prima facie* a surety for both the other signers. *Sayles v. Sims*, 73 N. Y. 551.

32. See 1 Brandt Sur. & Guar. (3rd Ed.), sec. 238; Sheldon on Subrogation (2nd Ed.), sec. 131; *Potts v. Nathans*, 1 W. & S. (Pa.) 155, 37 Am. D. 456; *Brandenburg v. Flynn's Exrs.*, 12 B. Monr. (Ky.) 397; *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527, 540; *Schnitzell's Appeal*, 49 Pa. St. 23; *Christman v. Jones*, 34 Ark. 73; *Hinckley v. Kreitz*, 58 N. Y. 583; *Chester v. Broderick*, 131 N. Y. 549; *Culiford v. Walser*, 158 N. Y. 65, 70 Am. St. R. 437-n; *Fidelity, etc. Co. v. Bowen*, 123 Ia. 356, 6 L. R. A. (N. S.) 1021, and cases cited in the opinion and note; *Ante*, sec. 134.

33. *Parsons v. Briddock*, 2 Vern. 608; *Burns v. Huntingdon Bank*, 1 Penr. & W. (Pa.) 395; *Potts v. Nathans*, *supra*; *Schnitzell's Appeal*, *supra*; *Opp v. Ward*, 125 Ind. 241, 21 Am. St. R. 220. See also, *Preston v. Preston*, 4 Gratt. (Va.) 88, 47 Am. D. 717.

34. *Chase v. Welty*, 57 Ia. 230; *Dillon v. Schofield*, 11 Neb. 419; *Hartwell v. Smith*, 15 Oh. St. 200.

thereon to which they can be subrogated;³⁵ and so where the several different sureties are bound for different and unconnected things having no relation to or operation upon one another, though the creditor and principal are the same.³⁶

§ 153. Successive Parties to Bills and Notes as Co-Sureties. Under ordinary circumstances, successive parties to bills and notes are not co-sureties, each being liable in case of dishonor to indemnify any party below him who has paid the instrument, unless it appears that as among themselves they agreed otherwise as a basis for contribution.³⁷ But parol evidence is quite generally held admissible to show that they, as among themselves, did so agree, and such agreement may be deduced from circumstances, as where it appears that they indorsed for the purpose of raising money for their joint benefit or in an enterprise in which they were jointly and equally interested.³⁸

Though accommodation parties to negotiable paper are in a general sense sureties for the same obligation, if they sign successively and without any agreement as to indemnity or contribution among themselves, each is entitled to recover the whole amount paid by him from any prior accommodation signer, upon the theory that each is presumed to have signed on the credit of

35. *Chester v. Broderick*, 131 N. Y. 549, distinguishing *Hinckley v. Kreitz*, 58 N. Y. 583.

36. *Rosenbaum v. Goodman*, 78 Va. 121, 127.

37. See N. Y. Neg. Inst. Law, sec. 38, and cases in the next note below.

38. *Phillips v. Preston*, 5 How. (U. S.) 278; *George v. Bacon*, 139 App. Div. (N. Y.) 208, citing *McDonald v. Whitfield*, 8 App. Cas. 733, 745; *Weeks v. Parsons*, 176 Mass. 570, 575; *Hagerty v. Phillips*, 83 Me. 336; *Easterly v. Barber*, 66 N. Y. 433, 437. Contra, *Johnson v. Ramsey*, 16 N. J. L. 68, 39 Am. R. at p. 119 in note as to successive accommodation indorsers. See *Stack v. Beach*, 74 Ind. 571 and note thereto in 39 Am. R. 113; *Gillispie v. Campbell*, 39 Fed. 724, 5 L. R. A. 698; *Gailbraith v. Martin*, 6 Humph. (Tenn.) 50.

those above him.³⁹ That the several accommodation parties paid an equal proportion of the note when it became due has been held not to change this rule.⁴⁰

But the agreement for co-suretyship and contribution between successive accommodation parties may be proved by parol, or it may be implied from circumstances, as where A, being in need of money, applied to X and Y. By arrangement between all the parties A drew a bill on X, who accepted it, and Y endorsed it, and it was held that X, the acceptor, having paid it, was entitled to contribution from the indorser, Y.⁴¹ And

39. McDonald v. Magruder, 3 Pet. (U. S.) 470; McCarty v. Roots, 21 How. (U. S.) 432; Aiken v. Barkley, 2 Spears (S. Car.) 747, 42 Am. Dec. 397-n; McCune v. Belt, 45 Mo. 174; Hillegas v. Stephenson, 75 Mo. 118, 42 Am. R. 393; Wilson v. Stanton, 6 Blackf. (Ind.) 507; Armstrong v. Harshman, 61 Ind. 52, 28 Am. R. 665; Farmers, etc. Bank v. Rathbone, 26 Vt. 19, 58 Am. D. 200; Briggs v. Boyd, 37 Vt. 534; Moore v. Cushing, 162 Mass. 594, 44 Am. St. R. 393; Knox v. Dixon, 4 La. 466, 23 Am. D. 488; Sherrod v. Rhodes, 5 Ala. 683; McGurk v. Huggett, 56 Mich. 187; Wolf v. Hostetter, 182 Pa. 292; Gore v. Wilson, 40 Ind. 206; Harris v. Jones, 22 N. Dak. —, and cases cited; Porter v. Huie, 94 Ark. 333, 28 L. R. A. (N. S.) 1039 and note where a multitude of cases are collected. But see Dillenbeck v. Dygert, 97 N. Y. 303, 49 Am. R. 525; Gomez v. Lazarus, 1 Dev. Eq. (N. Car.) 205; Stovall v. Border Grange Bank, 78 Va. 188; Daniel v. McRae, 2 Hawks (N. Car.) 590, 11 Am. D. 787; Leeke v. Hancock, 76 Cal. 127. Under the Georgia code successive accommodation parties are co-sureties. Hull v. Myers, 90 Ga. 674; Freeman v. Cherry, 46 Ga. 14.

40. Johnson v. Ramsey, 16 N. J. L. 68, 39 Am. R. 119, reported in note. *Contra*, Denton v. Lytle, 4 Bush (Ky.) 597, and see Talcott v. Cogswell, 3 Day (Conn.) 512. In Johnson v. Ramsey, *supra*, parol evidence was held inadmissible to vary the rule of liability. See *supra*, note 38.

41. Reynolds v. Wheeler, 10 C. B. (N. S.) 561. As sustaining the admissibility of parol evidence as between successive accommodation parties, see Macdonald v. Whitfield, 8 App. Cas. (P. C.) 733; Talcott v. Cogswell, 3 Day (Conn.) 512; Paul v. Ryder, 58 N. H. 119; Sloan v. Gibbs, 56 S. Car. 480, 76 Am. St. R. 559, and cases cited; Graves v. Johnson, 48 Conn. 160, 40 Am. R. 162; Davis v. Barrington, 30 N. H. 517; Weeks v. Parsons, 176 Mass. 570; Clapp v. Rice, 13 Gray (Mass.) 403; Whitehouse v. Hanson, 42 N. H. 9; Easterly v. Barber, 66 N. Y. 433; Ross v. Espey, 66 Pa. 481, 5 Am. R. 394; Preston v. Gould, 64 Ia. 44; Houck v. Graham, 106 Ind. 195, 55 Am. R. 727, and cases cited; Martin v. Marshall, 60 Vt. 321. Such an agreement is not within the statute of frauds. Sloan v. Gibbs,

it would seem that where each accomodation party signs with the understanding with the other accomodation signers that they will also sign, they will be presumed to be co-sureties and liable for contribution.⁴² -

A guarantor of a note is not a co-surety with the surety who signs as co-maker with the principal in the absence of an agreement to that effect, but is entitled to full indemnity from the latter,⁴³ and so of an aval or anomalous indorser.⁴⁴ Successive avals, however, are presumptively co-sureties or co-guarantors.⁴⁵ Under the Uniform Negotiable Instruments Act, however, successive avals are presumptively liable in the order in which their names appear upon the instrument, but under the same act parol evidence is admissible to show in what order, as between themselves, they agreed to be bound,⁴⁶ and where a party declined to indorse for the payee of a note unless another who was informed of the fact would sign first, he was held that he was not liable for contribution to the latter, but would be entitled to full indemnity from him if compelled to pay, and it would be immaterial in what order the names of the indorsers actually appeared on the paper.⁴⁷

supra. That parol evidence is not admissible in New Jersey as to the order of liability, see *Johnson v. Ramsey*, *supra*; *State v. Kehoe*, 58 N. J. L. 529; *Johnson v. Crane*, 16 N. H. 68.

42. *Heathey v. Phillips*, 83 Me. 336. See also *Currier v. Fellows*, 27 N. H. 366, with which compare *Clapp v. Rice*, 13 Gray (Mass.) 403, 74 Am. D. 639.

43. *Longley v. Griggs*, 10 Pick. (Mass.) 121; *Hamilton v. Johnston*, 82 Ill. 39; *Chapman v. Garber*, 46 Neb. 16; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. D. 345-n.

44. *Hamilton v. Johnson*, *supra*; *Nurre v. Chittenden*, 56 Ind. 463; *Houck v. Graham*, 123 Ind. 277, 106 Ind. 195, 55 Am. R. 727. Compare *Kieth v. Goodwin*, 31 Vt. 268; *Adams v. Flanagan*, 36 Vt. 400, 409. See *Core v. Wilson*, 40 Ind. 204.

45. *Camp v. Simmons*, 62 Ga. 73; *Golsen v. Brand*, 75 Ill. 148; *Schufelt v. Moore*, 93 Mich. 564; *Logan v. Ogden*, 101 Tenn. 392. But see *Thompson v. Taylor*, 12 R. I. 109.

46. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, and note thereto in 19 L. R. A. (N.S.) 136; *Harris v. Jones*, 22 N. Dak. — (1912), and authorities cited. Both of the above cases quote the act.

47. *Harris v. Jones*, *supra*.

§ 154. When Right to Contribution Arises—Statute of Limitations. The obligation to make contribution arises between co-sureties when their relation as such is established. It is regarded as an existing though contingent obligation, at least in equity, from that moment,⁴⁸ though no action for the recovery of money will lie by virtue of it either at law or in equity, until the surety seeking contribution has paid more than his just proportion of the debt, or such part of it as was left unpaid by the principal.⁴⁹

While a surety may pay the debt of the principal by installments, and recover each installment by separate action against the principal, as it is paid,⁵⁰ he must, in order to maintain an action for contribution against his co-sureties, have paid more than his just proportion of the whole debt, or of the balance remaining unpaid by the principal; and where the surety has paid a part,

48. *Washington v. Norwood*, 128 Ala. 383.

Sureties may, after the principal's default, but before payment, sue in equity to compel co-sureties to contribute with them to the payment of the debt. Post, sec. 180; *Wolmershausen v. Gullick*, 2 Ch. 514 (1893), reviewing many English authorities; *Hodgson v. Baldwin*, 65 Ill. 532; *Keach v. Hamilton*, 84 Ill. App. 413; *Hyde v. Tracy*, 2 Day (Conn.) 491; *Morrison v. Poyntz*, 7 Dana (Ky.) 307, 32 Am. D. 92; *Malone v. Stewart*, 235 Pa. St. 99.

When the debt becomes due and payable a surety may, upon paying more than his share thereof, sue his co-surety in equity to have a fraudulent conveyance set aside. *Washington v. Norwood*, supra, and cases cited. It has even been held that the surety may have an injunction against his co-surety to restrain a fraudulent conveyance, the principal being insolvent. *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. R. 728; *Hayden v. Thrasher*, 18 Fla. 795. So he may, after payment, sue to set aside a prior conveyance by a co-surety in fraud of his ultimate rights. *Smith v. Rumsey*, 33 Mich. 183; *Pashby v. Mandigo*, 42 Mich. 172. See *Ellis v. Land Co.*, 108 Wis. 313. See also, Post, sec. 164, where it is shown that the death of a co-surety does not discharge his estate from the obligation to contribute. *Bradley v. Burwell*, 3 Denio (N. Y.) 560.

49. *Davies v. Humphreys*, 6 M. & W. 153; *Strother's Admr. v. Mitchell's Ex'r*, 80 Va. 149; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635. See *Malone v. Stewart*, supra. As to whether the claim of a surety to contribution is provable in bankruptcy, see Post, sec. 163.

50. Ante, sec. 122; *Davies v. Humphries*, supra.

though less than his proportionate share of the whole, and the principal afterward pays the residue, the statute of limitations runs against the surety's claim for contribution from the date of the payment by the principal, for not until then does his right to contribution become fixed and ascertained.⁵¹ It would seem, however, that if a debt is payable by installments, a surety therefor who has paid the whole of one installment may have contribution from his co-sureties with respect to it;⁵² and where one surety has compromised the debt and fully discharged it, he may have contribution though the compromise cost him no more than he would have been compelled to pay as his proportion of the whole suretyship liability.⁵³ Where, however, a surety has paid what constitutes his just proportion of the whole debt as between himself and his co-sureties, he may have contribution on account of any subsequent payments he may make as often as he makes them.⁵⁴

Notice of payment or demand of contribution is not a condition precedent to the right of the paying surety to contribution, and consequently none need be averred or proved.⁵⁵

51. *Ex parte Gifford*, 6 Ves. 805; *Davies v. Humphries*, supra; *Ex parte Snowden*, 17 Ch. D. 44; *Stallworth v. Preslar*, 34 Ala. 505, *Preslar v. Stallworth*, 37 Ala. 402, 405; *Sherwood v. Dunbar*, 6 Cal. 53; *Richter v. Henning*, 110 Cal. 530; *Lytle v. Pope*, 11 B. Monr. 297, 307; *Robinson v. Jennings*, 7 Bush. (Ky.) 630; *Hooper v. Hooper*, 81 Md. 155, 174, 48 Am. St. R. 496; *Pass v. Grenada*, 71 Miss. 426; *Singleton v. Townsend*, 45 Mo. 379; *Sherwood v. Woodward*, 4 Dev. (N. Car.) 360, 25 Am. D. 714; *Leck v. Covington*, 99 N. Car. 559; *Durkin v. Kuney*, 19 Oreg. 71; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411-n; *Boutin v. Estill*, 110 Wis. 276; *Post*, sec. 165, and cases cited in note 25.

52. See *Davies v. Humphreys*, supra; *Lawson v. Wright*, 1 Cox Eq. Cas. 275; *Craythorne v. Swinburne*, 14 Ves. 160; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Bushnell v. Bushnell*, supra.

53. See *Post*, sec. 158, note 73.

54. *Davies v. Humphries*, 6 M. & W. 153; *Lawson v. Wright*, 1 Cox Eq. Cas. 275.

55. *Ante*, sec. 149, and cases cited in note 18.

§ 155. **Payment Must be Compulsory.** The payment on account of which contribution is sought must ordinarily be compulsory, though not in the sense that it is coerced by process of law. It is enough that the claim is one that the surety paying could not legally resist, and he is not bound to withhold payment until judgment, or until coerced by process of execution, on pain of losing recourse against his co-sureties.⁵⁶ But if the surety, knowing facts constituting a valid defense, neglects to interpose it, he cannot, as a rule, claim contribution. He is in the position of a more volunteer,⁵⁷ as where he fails to plead the statute of limitations;⁵⁸ though if the statute has not run against the paying surety, he may have contribution of his co-sureties, though it has run in their favor as against the creditor.⁵⁹

56. *Pitt v. Purssord*, 8 M. & W. 538; *Judah v. Mieure*, 5 Blackf. (Ind.) 171; *Wood v. Perry*, 9 Iowa 479; *Goodall v. Wentworth*, 20 Me. 322; *Hichborn v. Fletcher*, 66 Me. 209, 210, 22 Am. R. 562; *Warner v. Morrison*, 3 Allen (Mass.) 566; *Skrainka v. Rohan*, 18 Mo. App. 341, 344; *Mauri v. Hefferman*, 13 Johns (N. Y.) 58; *Bradley v. Burwell*, 3 Denio (N. Y.) 61; *Hoyt v. Tuthill*, 33 Hun (N. Y.) 196; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. D. 631; *Linn v. McClelland*, 4 Dev. & B. (N. C.) 458; *Acers v. Curtis*, 68 Tex. 423; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. R. 791; *Mason v. Pierron*, 69 Wis. 585; *Stockmeyer v. Oertling*, 36 La. An. 467. No request to pay on the part of the defendant sureties need be shown. *Hoyt v. Tuthill*, 33 Hun (N. Y.) 196.

57. *Russell v. Failor*, *supra* (usury); *Fordam v. Wallace*, 17 Jurist 228; *Hichborn v. Fletcher*, *supra*.

But where the surety pays in good faith, in ignorance of facts constituting a defense which would otherwise have been available to him, he is nevertheless entitled to contribution. *Warner v. Morrison*, *supra* (usury); *Cave v. Burns*, 6 Ala. 780 (failure of consideration).

Where the defense is purely personal to the paying surety, however, as where the obligation had been altered without his consent, he was entitled to contribution. *Houck v. Graham*, 106 Ind. 195, 55 Am. R. 727. But see as to the statute of limitations, *Post*, sec. 165, and note 28. As to payment after a discharge in bankruptcy, see *Craven v. Freeman*, 82 N. Car. 361, where recovery was permitted.

58. *Shelton v. Farmer*, 9 Bush. (Ky.) 314; *Post*, sec. 165 and cases cited in note 28.

59. *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. R. 791; *Glasscock v. Hamilton*, 62 Tex. 143; *Post*, sec. 165. *Contra*, *Shelton v. Farmer*, *supra*.

§ 156. Amount Recoverable Under Right to Contribution—Payment by Bill or Note. The rule as to non-resident and insolvent sureties having been already discussed,⁶⁰ it remains to be seen how much or what proportion of the debt is recoverable, apart from the circumstance of non-residence or insolvency, by one co-surety against his fellows by virtue of the right to contribution.

Ordinarily, and in the absence of special contract or circumstances, each surety is liable to his co-surety to the extent of his proportionate share of the whole debt, so that one who pays more than his aliquot proportion thereof may recover the excess from his co-surety or co-sureties.⁶¹ But where several separate bonds are given, no surety is liable to contribute beyond the penalty of his bond,⁶² and if the penalties of the several bonds are different, the obligation to contribute is proportionate, it seems, to their respective penalties.⁶³ And so where one bond is given with several sureties who thereby undertake for distinct portions of the whole debt. If the principal is in default for the entire debt each surety is liable for the whole amount for which he signed and cannot claim contribution, but if the princi-

60. Ante, sec. 149.

61. The rule ordinarily is to divide the whole amount of the debt by the whole number of solvent sureties, to charge each with his share of the debt discharged and to credit him with the amount of his payments. *Acres v. Curtis*, 68 Tex. 423; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635. See also *Ellesmere Brewery Co. v. Cooper*, 1 Q. B. D. 247.

62. *Deering v. Winchelsea*, 1 Cox 318, 2 B. & P. 270; *Craythorne v. Swinburne*, 14 Ves. Jr. 160.

63. 1 Story Eq. Jur., sec. 497; *Craythorne v. Swinburne*, supra; *Deering v. Winchelsea*, supra; *Pendelbury v. Walker*, 2 Y. & C. (Exch.) 424; *Ellesmere Brewery Co. v. Cooper* (1896), 1 Q. B. D. 75; *Bright v. Lennon*, 83 N. Car. 183, 187; *Moore v. Boudinot*, 64 N. Car. 190; *Bell v. Jasper*, 2 Ired. Eq. (N. Car.) 597; *Armitage v. Pulver*, 37 N. Y. 494; *Chipman v. Morrill*, 20 Cal. 130; *Fidelity & Deposit Co. v. Phillips*, 235 Pa. St. 469, 477. Compare *Young v. Shunk*, 30 Minn. 503; *Burnett v. Millsaps*, 59 Miss. 333; *Cherry v. Wilson*, 78 N. Car. 166; *United States Fid. and Guar. Co. v. McGinnis*, 147 Ky. 781, and see the article in 10 Cent. L. Jour. 264.

pal makes partial default the surety who pays is entitled to contribution for the liability discharged in the proportion that his liability bears to the whole debt secured, and not for an aliquot part of the amount of the default.⁶⁴

Where one of the sureties is a firm, it is counted as a single individual in ascertaining the obligation to contribute.⁶⁵

The surety paying is entitled in seeking contribution to an allowance for interest at the legal rate on his excess payment from the date thereof,⁶⁶ and for the expense of procuring, preserving or enforcing securities that inure to the common benefit.⁶⁷ Under a judgment against co-sureties jointly for the debt and costs, the one paying such judgment is clearly entitled to his equitable proportion of the costs as well as the original debt,⁶⁸ and the same rule applies to reasonable counsel fees.⁶⁹ But where a surety is sued alone it seems that he is not entitled to contribution for costs incurred in defending the action unless he was authorized by his co-sureties to make the defense,⁷⁰ or unless the defense was

64. *Ellsmere Brewery Co. v. Cooper*, *supra*, and authorities cited in the opinion.

65. *Chaffee v. Jones*, 19 Pick. (Mass.) 260.

66. *Lawson v. Wright*, 1 Cox Eq. Cas. 227; *Swain v. Wall*, 1 Ch. R. 149; *Buckmaster v. Grundy*, 8 Ill. 626; *Bosley v. Taylor*, 5 Dana (Ky.) 160; *Titcomb v. McAllister*, 81 Me. 399; *Swain v. Mason*, 44 Neb. 610; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411. and cases cited.

67. Post, sec. 171.

68. *Kemp v. Finden*, 12 M. & W. 421; *Security Co. v. St. Paul Co.*, 50 Conn. 233; *Newcomb v. Gibson*, 127 Mass. 396; *Stothoff v. Dunham*, 4 Harr. (N. J. L.) 181, 185; *Davis v. Emerson*, 17 Me. 64; *Van Winkle v. Johnson*, 11 Oreg. 469, 50 Am. R. 495; *Van Patten v. Richardson*, 68 Mo. 379; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635; *Foster v. Johnson*, 5 Vt. 60; *Marsh v. Harrington*, 18 Vt. 150.

69. *Van Winkle v. Johnson*, *supra*; *Gross v. Davis*, *supra*; *Marsh v. Harrington*, 18 Vt. 150; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98.

70. *Tindall v. Bell*, 11 M. & W. 228; *Knight v. Hughes*, 3 C. & P. 467; *Newcomb v. Gibson*, 127 Mass. 396; *Boardman v. Paige*, 11 N. H. 431; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. R. 562; *Comegys v. State Bank*, 6 Ind. 357.

undertaken prudently and in good faith against what appeared to be an illegal, doubtful or excessive demand, or has resulted in a diminution of the creditor's claim.⁷¹

The surety who discharges the debt cannot, in seeking contribution of his co-sureties, any more than in seeking indemnity from his principal,⁷² speculate on their liability, and if he compromises with the creditor, he can only recover of his co-sureties their proportionate shares of what the compromise actually cost him.⁷³

If the surety seeking contribution pays with his own bill or note, however, we find practically the same conflict of authority as where he seeks indemnity from his principal on the basis of such a payment, and the cases on contribution are often cited interchangeably with those on the subject of indemnity.⁷⁴

71. See *Wolmershausen v. Gullick* (1893), 2 Ch. 514; *Connolly v. Dolan*, 22 R. I. 60, 84 Am. St. R. 816; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. R. 635; *Bouton v. Etsell*, 110 Wis. 276; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98; *Davis v. Emerson*, 17 Me. 64; *Backus v. Coyne*, 45 Mich. 584; *Bosley v. Taylor*, 5 Dana (Ky.) 157, 30 Am. D. 677; *Wagenseller v. Prettyman*, 7 Ill. App. 192; *Bright v. Lennon*, 83 N. Car. 183. But see *Van Winkle v. Johnson*, 11 Oreg. 469, 50 Am. R. 495, and cases cited to the effect that there is liability for costs unless the defendant offers to pay before suit.

72. Ante, sec. 127.

73. *Derosset v. Bradley*, 63 N. Car. 17; *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 653; *Sinclair v. Redington*, 56 N. H. 146; *Owen v. McGehee*, 61 Ala. 440; *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. R. 272; *Acers v. Curtis*, 68 Tex. 423; *Laabe v. Bernard*, 196 Mass. 551, 14 L. R. A. (N. S.) 457.

If the surety pays the debt in property, he can recover only the excess beyond his proportionate share of the actual value of the property, (Ante, sec. 127; *Edmonds v. Sheahan*, 47 Tex. 443); unless such value exceeds the debt, when he can recover only beyond his proportionate share of the debt. *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 558. If the surety pays in depreciated paper he can recover only its value at the time he turned it out. *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 558.

74. See Ante, sec. 130, and authorities cited. See also, *Smith v. Mason*, 44 Neb. 610, 615, and cases cited; *Ryan v. Krusor*, 76 Mo. App. 496; *Nixon v. Beard*, 111 Ind. 137; *Chandler v. Brainerd*, 14 Pick. (Mass.) 285; *Bell v. Boyd*, 76 Tex. 133; *Ralston v. Wood*, 15 Ill. 159. But where a debt for which there are several sureties is discharged by the note of the principal and one of the sureties the

§ 157. Contribution as Affected by Special Contract.

Though the right to contribution rests upon principles of equity rather than upon strict contract, it may be modified or abrogated by contract.⁷⁵ Thus, a surety may promise to fully indemnify his co-surety against liability, and if the latter signs in consideration of such promise, he is not liable to contribute to the promisor, but may recover full indemnity from him.⁷⁶ But it has been held that where it is agreed that one surety shall not be liable for contribution to his co-surety, he cannot, in the absence of agreement to that effect, have contribution or indemnity from the latter.⁷⁷

A contract by which the right to contribution is modified or abrogated, may be implied from circumstances,⁷⁸ and if oral, may be shown by parol, notwithstanding the statute of frauds.⁷⁹

latter cannot have contribution against his co-sureties on the first note, for it cannot be said to have been paid by him. *Bell v. Boyd*, 77 Tex. 133; *Chapman v. Garber*, 46 Neb. 14.

75. *Batard v. Hawes*, 2 El. & Bl. 287; *Robertson v. Deatherage*, 82 Ill. 511; *Harris v. Warner*, 13 Wend. (N. Y.) 400; *Norton v. Coons*, 6 N. Y. (2 Seld.) 33. See *Ante*, sec. 151, and cases throughout this section.

76. *Hayden v. Thrasher*, 18 Fla. 795; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Blake v. Cole*, 22 Pick. (Mass.) 97; *Cutter v. Emery*, 37 N. H. 567; *Apgar v. Hiler*, 4 Zab. (N. J.) 812; *Anderson v. Pearson*, 2 Bail. (S. C.) 107; *Harrison v. Lane*, 5 Leigh. (Va.) 414, 27 Am. D. 607. In *Martin v. Marshall*, 60 Vt. 321, the contract of indemnity was inferred from the fact that the co-surety's signing was particularly for the benefit of the surety from whom indemnity was asked. In this case the defendant was to have \$24 for getting the note discounted and procured the plaintiff's signature to assist him in so doing. See also, *Ante*, sec. 151.

77. *Norton v. Coons*, 3 Denio (N. Y.) 130.

78. In *re Koch's Est.*, 148 Wis. 548. But whether a request by a surety to another to sign with him implies a contract to relieve the latter from the obligation to contribute or an undertaking to indemnify him, has not, as we have seen, been uniformly decided. *Ante*, sec. 151; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. D. 254.

79. 1 *Brandt Sur. & Guar.* (3rd Ed.), sec. 287; *Graves v. Johnson*, 48 Conn. 160, 40 Am. R. 162; *Schindler v. Muhlheiser*, 45 Conn. 154; *Robertson v. Deatherage*, 82 Ill. 511; *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. R. 559. See *Norton v. Coons*, 6 N. Y. (2 Seld.) 33; *Barry v. Ransom*, 12 N. Y. (2 Kernan) 464.

CHAPTER XIV.

DEFENSES TO ACTIONS FOR CONTRIBUTION.

§ 158. In General. Common defenses, complete or partial, to actions for contribution between sureties may be summarized as follows:

1. That the surety seeking it is indemnified or made payment with the principal's funds.
2. Giving time to co-surety or principal without consent of co-surety.
3. Release of principal or co-surety by the creditor, or by the surety, or with his consent.
4. Release or loss by surety of collaterals held of principal.
5. Bankruptcy of surety.
6. Death of co-surety (by a few authorities).
7. Statute of limitations.
8. Set-off.
9. Fraud of plaintiff, or his misconduct contributing to principal's default.

That the defendant co-surety lacked capacity to contract; that the plaintiff was a mere volunteer; that the defendant has paid his contributive share; that the plaintiff had undertaken to indemnify him, and the like, have already been considered, or are so obviously defensive as to require no special comment. Indeed the defenses that may exist between co-sureties in actions for contribution are the same in general that may arise between co-principals.

§ 159. Surety Indemnified. Where a surety receives indemnity from his principal on account of the debt for which others are bound as co-sureties with him, he is not entitled, as a rule, to avail himself of the right of contribution beyond the excess paid by him above the

value of the security given, unless he is ready to surrender such security for the common benefit,¹ and to the extent that he wilfully or negligently wastes or impairs it, his rights against his co-sureties are likewise impaired.² But a surety who has taken indemnity for a prior individual suretyship as well as a later joint one, may, it seems, have full contribution if he pays under the latter obligation where the indemnity is insufficient to cover his prior individual obligation.³

§ 160. Giving Time to Co-Surety or Principal. Where a surety consents to the giving of time to the principal by the creditor he is not released, but if he pays the debt he will be without remedy against his non-consenting co-sureties for contribution.⁴

It has been held in England that if a surety who pays the debt gives time to the principal, this does not discharge his co-sureties from liability to contribute,

1. Post, secs. 168, 171; Brandt on Sur. & Guar. (3rd Ed.), sec. 339; Steel v. Dixon, 17 Ch. D. 825; Fagan v. Jacocks, 15 N. Car. 263; Bachelder v. Fiske, 17 Mass. 464; Carrier v. Fellows, 27 N. H. 366; Morrison v. Taylor, 21 Ala. 779; Silvey v. Dowell, 53 Ill. 260.

That the plaintiff co-surety has taken security, other than money, from the principal is not technically a defense to his suit for contribution, unless it be shown that the security taken has been wasted or negligently lost or is wrongfully withheld. See Glasscock v. Hamilton, 62 Tex. 143, 158; Mosley v. Fullerton, 59 Mo. App. 143; Johnson v. Vaughn, 65 Ill. 425.

That the plaintiff paid the debt with the property or funds of the principal is, of course, a complete defense to his claim for contribution. Goepel v. Swinden, 1 Dowl. & L. 888; Silvey v. Dowell, supra; Caldwell v. Roberts, 1 Dana (Ky.) 355. And in view of the fact that the principal's property is a common fund to which all the sureties have an equitable right to resort for reimbursement, one co-surety who buys it in on execution under a judgment against all, paying less than its fair value, forfeits his right to contribution save as to any excess he may have paid beyond the fair value of such property. Sanders v. Weelburg, 107 Ind. 266.

2. Post, sec. 162.

3. Titcomb v. McAllister, 81 Me. 399; Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270.

4. See 1 Brandt Sur. & Guar. (3rd Ed.), sec. 306, and cases cited.

even though they did not consent.⁵ The authorities in this country, however, are the other way.⁶

A valid contract between the creditor and a surety for an extension of time to the latter ordinarily releases his non-consenting co-sureties to the extent, and to the extent only, that the surety released would be bound as between them all to contribute to its payment.⁷

§161. Release of Principal or Co-Surety by Creditor or by Surety or with his Consent. If the surety who pays has wholly released the principal from his obligation to indemnify or reimburse him, his right to contribution from his co-sureties is defeated on the ground that he has destroyed their right of subrogation as against the principal.⁸

If the surety seeking contribution has validly released a co-surety from his liability to contribute, however, his co-sureties remain bound in the same proportion as if the surety released had continued liable.⁹ The surety granting such release has simply surrendered his claim upon the surety released for his contributive share,

5. *Greenwood v. Francis*, L. R. Q. B. 312, 321 (1895). See also, *Vorley v. Barrett*, 1 C. B. (N. S.) 225. Compare *Way v. Hearn*, 11 C. B. (N. S.) 774, 778; *Hodgson v. Hodgson*, 2 Keen 704; *Gervais' Est.*, 1 L. R. 172.

6. 1 *Brandt Sur. & Guar.* (3rd Ed.), sec. 307; *Broughton v. Bank of Orleans*, 2 Barb. Ch. (N. Y.) 459; *Beckham v. Peide*, 6 Rich. Eq. (S. Car.) 78. See *Brown v. McDonald*, 8 Yerg. (Tenn.) 158, 29 Am. D. 112.

7. *Ide v. Churchill*, 14 Oh. St. 372, 388; Post, sec. 241, and cases cited in notes 48, 49, 50, 51. If the extension to one surety involved an alteration of the written instrument by which the sureties are bound this would doubtless work an entire release of the non-consenting co-sureties. *Ide v. Churchill*, supra.

An unauthorized extension of time to a surety who afterward pays does not prevent him from having contribution from his co-sureties. *Dunn v. Slee*, 1 Moo. C. P. 2.

8. *Draughan v. Bunting*, 9 Ired. L. (N. Car.) 10; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98; *Glasscock v. Hamilton*, 62 Tex 143.

9. *Hodgson v. Hodgson*, 2 Keen 704; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. D. 497; *Currier v. Baker*, 51 N. H. 613; *Glasscock v. Hamilton*, 62 Tex. 143; *Klingensmith v. Klingensmith*, 31 Pa. St. 460; *Alford v. Baxter*, 36 Vt. 158.

and if he consents to such a release by the creditor he cannot claim contribution from the surety so released.¹⁰ It is otherwise, however, where the release given by the creditor is without the consent of the surety, unless he was himself released.¹¹

Where the creditor releases or covenants not to sue the principal, all the sureties are discharged unless they consent, or are indemnified, or rights against the principal are reserved,¹² and a surety paying with notice or knowledge of such covenant or release cannot have contribution from his co-sureties.¹³

§ 162. Release or Loss by Surety of Collateral Security as Affecting Right to Contribution. As we have already seen co-sureties are entitled, as a general rule, to share equitably for their indemnity in any security that the principal may have given to any one of them for the debt or liability for which they are bound.¹⁴ If, therefore, a surety seeking contribution has released such security without the consent of his fellows, or has negligently or wilfully lost or squandered it, his right to contribution will be extinguished to the extent that his co-sureties were entitled to benefit by the security so lost or impaired.¹⁵

§ 163. Bankruptcy of Co-Surety. A discharge of a surety in bankruptcy proceedings commenced after his obligation to contribute has become fixed by payment by

10. *Bouchaud v. Dias*, 3 Denio (N. Y.) 238; *Moore v. Ilsley*, 22 N. Car. 372; *Broughton v. Bank of Orleans*, 3 Barb. Ch. (N. Y.) 458. And so if he pays the whole debt with knowledge of such release. *Craven v. Freeman*, 82 N. Car. 361.

11. *Clapp v. Rice*, 81 Mass. 557, 77 Am. D. 387; *Boardman v. Paige*, 11 N. H. 431; *Hill v. Morse*, 61 Me. 541, and cases cited.

12. Post, secs. 225 et seq.

13. *Tobias v. Rogers*, 2 Edm. Seld. Cas. 168; *Craven v. Freeman*, 82 N. Car. 361; *Draughan v. Bunting*, 9 Ired. (N. Car.) 10; *Broughton v. Bank of Orleans*, 2 Barb. Ch. (N. Y.) 458.

14. Ante, secs. 159; Post, sec. 168.

15. Post, sec. 171, and cases cited; *Estate of Koch*, 148 Wis. 548.

his co-surety is, of course, a good defense to an action for contribution, for the claim of the latter was clearly a provable debt under the bankruptcy act.¹⁶ But where, at the time of the bankruptcy proceeding against his co-surety, the surety seeking contribution has not paid in excess of his share the question is both difficult and doubtful, and depends, in general, upon whether the claim to contribution was provable under the commission. A majority of the authorities hold that the claim is not so provable and hence is not barred, for though the bankruptcy acts provide for proof of contingent claims or liabilities, the liability for contribution is, under the circumstances, not merely contingent, but it is one that may never exist, (1) because the principal may himself pay, (2) because, though the principal does not pay, the surety may never be called upon to pay.¹⁷

But there is some authority the other way.¹⁸

A surety discharged in bankruptcy, however, may voluntarily pay the creditor and recover contribution

16. The amount for which the paying surety may prove against his co-surety in bankruptcy or insolvency proceedings against the latter on his estate is the subject of some conflict. See Post, sec. 170.

17. *Ex parte* Snowden, 17 Ch. Div. 49; *Liddell v. Wiswell*, 59 Vt. 365; *Clements v. Langley*, 2 Nev. & M. 269; *Goss v. Gibson*, 8 Humph. (Tenn.) 197; *Eberhardt v. Wood*, 2 Tenn. Ch. (Cooper), 488; *Dunn v. Sparks*, 1 Ind. 397, 50 Am. D. 473; *Swain v. Barber*, 29 Vt. 292; *Keer v. Clark*, 11 Humph. (Tenn.) 77; *Byers v. Alcorn*, 6 Ill. App. 39; *Paddleford v. State*, 57 Miss. 118. Compare *Wolmershausen v. Gullick*, L. R. 2 Ch. (1893) 514, and *Ex parte* Snowden, *supra*. While these rulings were made under earlier acts they are doubtless applicable under the act of 1898. It would seem clear, however, that a surety who pays before the time for proving claims against his bankrupt co-surety's estate had expired would have a right to file and prove under section 63 the act. See *In re Smith*, 146 Fed. 923.

18. *Goss v. Gibson*, 8 Humph. (Tenn.) 197; *Tobias v. Rogers*, 13 N. Y. 59. See also, *Johnson v. Harvey*, 84 N. Y. 363, 366, 38 Am. R. 515; *Miller v. Gillespie*, 59 Mo. 220; *Smith v. Hodson*, 50 Wis. 279. In this last case, conceding that the liability was a provable one, there was no discharge because the principal was the government against which no discharge could be claimed. See also, *Hays v. Ford*, 55 Ind. 52.

from his co-sureties on account of such payment.¹⁹ The right of the surety to prove in bankruptcy against the principal and the effect of such proof are considered elsewhere.²⁰ Under the present bankruptcy act of 1898, however it is probable that the existing claim of a surety to contribution would not survive the discharge of his co-surety as against the creditor, as a different result would violate the rule against double proof.²¹

§ 164. Death of Co-Surety. Where sureties are bound jointly, a few cases hold that the estate of a deceased co-surety is not liable at law for contribution upon the ground that the obligation, being joint, must necessarily devolve wholly upon the survivors.²² This ground is generally regarded as untenable, however, even at law, for the liability of co-sureties to one another for contribution arises by implication the moment the relation of co-suretyship is established, and is several rather than joint, even where their undertaking in favor of the creditor is joint, and the estate of the deceased co-surety is held liable to the extent that there are assets.²³

Where, after a surety has discharged the whole of the debt, his co-surety is insolvent, he may, by the weight of authority, prove against the estate of the latter for the whole amount that he paid, and may have dividends until he has received one half of what he paid.

19. *Craven v. Freeman*, 82 N. Car. 361.

20. Ante, sec. 125.

21. *In re Bingham*, 94 Fed. R. 796. And so under the English Act of 1883, *Wolmershausen v. Gullick* (1893), 2 Ch. 514. Compare *Hill v. Harding*, 130 U. S. 699.

22. See *Primrose v. Bromley*, 1 Atk. 90; *Waters v. Riley*, 2 Har. & G. (Md.) 305, 18 Am. D. 302; *Helmer v. St. John*, 8 Hun (N. Y.) 166. See also, *Stothoff v. Durham*, 4 Harr. (N. J.) 181.

23. *Batard v. Hawes*, 2 El. & Bl. 287; *Ashby v. Ashby*, 7 B. & C. 444; *Bradley v. Burwell*, 3 Denio (N. Y.) 61; *Batchelder v. Fisk*, 17 Mass. 464; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. R. 515; *Helmer v. St. John*, supra; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Stephens v. Meek*, 6 Lea (Tenn.) 226; *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642, 652; *Vliet v. Wyckoff*, 42 N. J. Eq. 642; *Koelsch v. Mixer*, 52 Oh. St. 207; *Camp v. Bostwick*, 20 Oh. St. 337; *Conover v. Hill*, 76 Ill. 342.

This is upon the theory that a surety paying the whole debt is entitled to be subrogated to the rights and remedies of the creditor against the co-surety, and since the creditor might prove against the co-surety for the whole debt, so may the paying surety in seeking contribution.²⁴

§ 165. **Statute of Limitations.** The statute of limitations is a good defense to an action for contribution, and it runs in favor of a surety from the time when the co-surety seeking it has paid more than his just proportion of the debt, for not until then does the right to enforce contribution arise.²⁵ It should be noted, however, that where the surety has paid more than his share upon a written instrument, the period of limitations applicable to such instruments does not apply to his suit for contribution against a co-surety thereon, but the shorter period allowed in many states for suits on unwritten contracts, on the ground that his cause of action arises out of the fact of payment and not upon the written contract with the creditor.²⁶

On the principle that the surety's right to contribution arises only when he pays more than his just proportion of the debt, if he so pays before the claim of the creditor against him is barred, he may recover contribution from his co-surety though the creditor's claim

24. Post, sec. 170, and cases cited.

25. See Ante, sec. 154. If the surety pays before maturity however, the statute runs, not from the date of payment, but from the maturity of the debt. *Truss v. Miller*, 116 Ala. 494; *Davies v. Humphreys*, 6 M. & W. 53; *Golsen v. Brand*, 75 Ill. 148; *Ross v. Menefee*, 125 Ind. 432; *Barber v. Gibson*, 18 Nev. 89; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411, and cases cited; *Bullock v. Campbell*, 9 Gill (Md.) 182.

26. *Chipman v. Morrill*, 20 Cal. 130; *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. R. 272; *Nelson v. Fry*, 16 Oh. St. 557; *Faires v. Cockrell*, 88 Tex. 428, 28 L. R. A. 528; *Sexton v. Sexton*, 35 Ind. 88; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411; *Metzer v. Burlingame*, 78 Kan. 219, 18 L. R. A. (N. S.) 585, and note. But see *Hull v. Meyers*, 90 Ga. 674, 681; *Sublett v. McKinney*, 19 Tex. 438, overruled in *Faires v. Cockrell*, *supra*.

against such co-surety is barred.²⁷ But a surety who pays after the claim of the creditor against him is barred, cannot, by the weight of authority, have contribution against his co-sureties, as he is in the attitude of a mere volunteer,²⁸ and it would seem clear that no recovery could be had where the rights of the creditor were barred as to all the sureties.²⁹

§ 166. Set off and Counterclaim as Affecting the Right to Contribution. That a surety who sues his co-surety

27. *Preslar v. Stallworth*, 37 Ala. 402; *William v. Ewing*, 31 Ark. 229; *May v. Van*, 15 Fla. 553; *Richter v. Henningsan*, 110 Cal. 530; *Hill v. Morse*, 61 Me. 541; *Wood v. Leland*, 1 Met. (Mass.) 387; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. D. 178; *Boardman v. Page*, 11 N. H. 431; *Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. R. 669; *Martin v. Frantz*, 127 Pa. 389, 14 Am. St. R. 859, and cases cited; *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143; *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119, 9 Id. 153; *Glasscock v. Hamilton*, 62 Tex. 143; *Culmer v. Wilson*, 13 Utah 129, 57 Am. R. 713; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. R. 791. This is the rule where the obligation at the time of payment by the surety is alive against him by virtue of a valid judgment in favor of the obligee. *Kelley v. Sproul*, 153 Mich. 691. See also, *Glasscock v. Hamilton*, 62 Tex. 143. Contra, *Sheldon v. Farmer*, 9 Bush. (Ky.) 314; *Cochran v. Walker*, 82 Ky. 220, 56 Am. R. 891. See also, *Leeds Lumber Co. v. Haworth*, 98 Ia. 463, 60 Am. St. R. 199, 201, note. In *Partee v. Mathews*, 53 Miss. 140 the statute was held to run against a surety paying a judgment against the principal and co-sureties from the date of the judgment, on the theory that he was subrogated to such judgment.

28. *Dussol v. Bruguere*, 50 Cal. 456, 459; *Machado v. Fernandez*, 74 Cal. 362, 363; *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Hatchett v. Pegram*, 21 La. An. 722; *Godfrey v. Rice*, 59 Me. 308, 309; *Hooper v. Hooper*, 81 Md. 155, 174; *Singleton v. Townsend*, 45 Mo. 379, 380; *Green v. Milbank*, 56 How. Pr. 382, 389; *Wheatfield v. Brush Valley*, 25 Pa. 112; *Cocke v. Hoffman*, 5 Lea (Tenn.) 105, 40 Am. R. 23; *Turner v. Thom*, 89 Va. 745. See also, *Ramsback v. Reimer*, 8 Minn. 70. Contra, *Jones v. Blanton*, 6 Ired. Eq. (N. Car.) 115, 51 Am. D. 415; *Bright v. Lennon*, 83 N. Car. 183, 189, and authorities cited, (but compare *Reeves v. Bell*, 2 Jones (N. Car.) 254, and *Craven v. Freeman*, 82 N. Car. 361, 362-363); *Mills v. Hyde*, 19 Vt. 59, 46 Am. D. 177, with which compare *Aldrich v. Aldrich*, 56 Vt. 324, 327, 48 Am. R. 791. See *Norton v. Hall*, 41 Vt. 471. As to whether a new promise or part payment by one co-promisor, whether principal or surety, will remove the bar of the statute or cause it to run anew as to the others, see *Aldrich v. Aldrich*, supra; Post, sec. 205.

29. See *Odlin v. Greenleaf*, 3 N. H. 270, 271.

for contribution is liable to be met by any matter of set off or counterclaim available against him and in favor of the defendant, and appropriate to the form of action in which contribution is sought, is too plain to require the citation of authorities. But the one from whom contribution is sought, cannot, it seems, set off against the surety seeking it, a debt due from the latter to the principal unless the principal is insolvent, or there is some other equitable reason why such set off should be allowed.³⁰

§ 167. Misconduct of Surety as Affecting Right to Contribution. The misconduct of the surety may debar him from any right to contribution. Thus a surety who has been induced to sign by fraud of a co-surety is not liable to the latter for contribution;³¹ and similarly where he has signed upon an illegal consideration moving from the principal, unknown to the creditor, but known to him and his co-sureties.³²

Neither can a surety recover contribution where he was in a legal sense the cause of the principal's default, or the liability of the principal was directly due to his negligent or illegal act. Thus a deputy sheriff cannot recover contribution as one of the bondsmen of the sheriff, where such deputy's own default is the basis of the sheriff's liability.³³ So where a surety for an adminis-

30. *Davis v. Toulmin*, 77 N. Y. 280; *O'Bemis v. Karing*, 57 N. Y. 649; *Smith v. Dickinson*, 100 Wis. 574; *Neely v. Bee*, 32 W. Va. 519. But it has been held that a surety is not entitled to contribution where, at the time of payment, he was indebted to the principal to the extent of his payment as surety. *Bezzell v. White*, 13 Ala. 422. There was in this case an allegation of the principal's insolvency, but the point was not distinctly noticed by the court.

31. See *Mackreth v. Walmsley*, 51 L. T. 19, 30, per *Kay J.*

32. *Ramsay v. Whitbeck*, 183 Ill. 550.

33. *Block v. Estes*, 92 Mo. 318. See also, *Simmons v. Camp*, 71 Ga. 54; *Rile v. McCoy*, 99 Tenn. 367; *In re Koch's Est.*, 148 Wis. 548; *Schoenfeld v. Gaskill*, 60 Ga. 277. In *Crisfield v. Murdock*, 127 N. Y. 315, the cashier of a bank who was a co-surety with others for the obligation of one of its depositors received from the principal a check on his bank which he omitted for several days to use or

trator, as attorney for him, negligently deposited trust funds in an insolvent bank, he was held not entitled to recover from his co-sureties.³⁴ But in the leading case of *Deering v. Earl of Winchelsea*,³⁵ where the misconduct imputed to the surety was that he had encouraged the principal, his brother, in private irregularities, particularly in gaming, knowing that his fortune would not permit such a course and a faithful account to the principal, he was nevertheless entitled to contribution from his co-sureties on the ground that he was morally but not legally the cause of the loss, and that mere general depravity does not prevent a man from coming into a court of equity with clean hands.

transmit according to directions, and the failure of the bank caused the principal to default. Held that the cashier was liable as to his co-sureties for the entire loss. And see *Post*, sec. 171.

34. *Eshleman v. Bolenius*, 144 Pa. 269. See also *Crisfield v. Murdock*, 127 N. Y. 315; *Flanagan v. Duncan*, 133 Pa. 373; *In re Koch's Est.*, 148 Wis. 548. Where one surety for a trustee consents to an improper use of trust funds, he cannot claim contribution but must, up to the limit of his own bond, indemnify his co-surety who paid the loss on his own bond. *Fidelity and Deposit Co. v. Phillips*, 235 Pa. St. 469.

35. 2 B. & P., 270.

CHAPTER XV.

CO-SURETIES AND SUBROGATION OF CO-SURETIES.

§ 168. **Subrogation of Co-Sureties to Securities Held of the Principal.** If one or more who are co-sureties have received security of the principal with respect to the debt by way of indemnity, it inures equally to the benefit of all, upon principles of equity and natural justice. This rule is universally recognized though variously expressed. Thus in the leading case of *Steel v. Dixon*,¹ after stating that the result of *Deering v. Earl of Winchelsea* is to require that the ultimate burden, whatever it may be as between co-sureties, is to be borne by them in proportion to the shares of the debt for which they have made themselves responsible, Fry J. said: "If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, 'as between himself and his co-sureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require.

"In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called by Mr. Cookson. Mr. Justice Story, in his *Equity Jurisprudence*² asserts the principle in these terms: 'Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal,

1. L. R. 17 Ch. Div. 825 (1881).

2. 11th Ed. Pl. 499.

but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities.' And in the case of *Miller v. Sawyer*,³ which was before the Court of Chancery in the State of Vermont, the principle is stated thus by Mr. Justice Barrett, delivering the judgment of the court. Having referred to *Deering v. Earl of Winchelsea*, he said: 'For present purposes it is needless to cite and discuss the books and cases to any considerable extent, in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated, that persons subject to a common burden stand in their relation to each other upon a common ground of interest and of right, and whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, enures equally to the relief of all the common associates;' and in the course of his judgment he refers, among other cases, to that of *Hall v. Robinson*,⁴ in which Chief Justice Ruffin said: 'The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that, when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive.'"⁵ The same prin-

3. 30 Vt., 412.

4. 8 Iredell, (N. Car.) 56.

5. See as directly or indirectly supporting this principle which is generally if not universally recognized as elementary, 1 Brandt Guar. & Sur. (3rd Ed.) sec. 294 and cases cited; Sheldon on Subrogation sec. 143; *Berridge v. Berridge*, 44 Ch. D. 168; *Lidderdale v. Robinson*, 12 Wheat (U. S.) 594; *Bell v. Lamkin*, 1 St. & P. (Ala.) 460; *White v. Banks*, 21 Ala. 705, 56 Am. D. 283; *Steele v. Mealing*, 24 Ala. 285; *Tyus v. Dejarnette*, 26 Ala. 280; *Taylor v. Morrison*, 26 Ala. 728, 62 Am. D. 747, *Hartwell v. Whitman*, 36 Ala. 712; *Munden v. Bailey*, 70 Ala. 63; *Vandiver v. Pollak*, 107 Ala. 547, 54 Am. St. R. 118; *Fishback v. Weaver*, 34 Ark. 569; *Gibson v. Shehan*, 5 App. Cas. Dist. Col. 391; *Cannon v. Connaway*,

ciple applies where the surety, instead of receiving the security directly from the principal, becomes entitled to it by assignment from the creditor upon payment of the debt.⁶ He is a quasi trustee for his co-sureties.

In order that the right of subrogation shall exist between several liable for the same debt, however, they must be co-sureties in such sense as to entitle them to contribution under rules already laid down.⁷ Furthermore it has been held that a surety is not entitled to be

5 Del. Ch. 559; *Simmons v. Camp*, 71 Ga. 54; *Pierce v. Garrett*, 65 Ill. App. 682; *Comegys v. State Bank*, 6 Ind. 357; *Whiteman v. Harriman*, 85 Ind. 49; *Sanders v. Weelburg*, 107 Ind. 266; *Keiser v. Beam*, 117 Ind. 31; *Reinhart v. Johnson*, 62 Iowa 155; *Hoover v. Mowrer*, 84 Iowa 43, 35 Am. St. R. 293; *Seibert v. Thompson*, 8 Kan. 65; *Peoples State Bank v. Miller*, 85 Kan. 272; *Goodloe v. Clay*, 6 B. Monr. (Ky.) 236; *Teeter v. Pierce*, 11 B. Monr. (Ky.) 399; *Smith v. Conrad*, 15 La. Ann. 579; *Scribner v. Adams*, 73 Me. 541; *Lane v. Stacy*, 8 Allen (Mass.) 41; *Bachelder v. Fisk*, 17 Mass. 464; *Schmidt v. Coulter*, 6 Minn. 492; *Mueller v. Barge*, 54 Minn. 314; *Barge v. Van der Horck*, 57 Minn. 497; *Chilton v. Chapman*, 13 Mo. 470; *McCune v. Belt*, 45 Mo. 174; *Tolle v. Boeckler*, 12 Mo. App. 54; *Low v. Smart*, 5 N. H. 353; *Brown v. Ray*, 18 N. H. 102, 45 Am. D. 361; *Currier v. Fellows*, 27 N. H. 366; *Wolcott v. Hagerman*, 50 N. J. 289; *Crisfield v. Murdock*, 127 N. Y. 315; *Ramsey v. Lewis*, 30 Barb. (N. Y.) 403; *Fielding v. Waterhouse*, 40 N. Y. Supr. Ct. 424; *Fagan v. Jacocks*, 4 Dev. (N. Car.) 263; *Gregory v. Murrell*, 2 Ired. Eq. (N. Car.) 233; *Hall v. Robinson*, 8 Ired. (N. Car.) 56; *Barnes v. Pearson*, 6 Ired. Eq. (N. Car.) 482; *Leary v. Cheshire*, 3 Jones Eq. (N. Car.) 170; *Parham v. Green*, 64 N. Car. 436; *Wilson v. Stewart*, 24 Oh. St. 504; *Farmer's Bank v. Teeters*, 31 Oh. St. 36; *Farmers' Bank v. Snodgrass*, 29 Oreg. 395, 54 Am. St. R. 797; *Moore v. Bray*, 10 Pa. (Barc.) 519; *Shaeffer v. Clendenin*, 100 Pa. 565; *Field v. Pelot*, McMull Eq. (S. Car.) 369; *Glasscock v. Hamilton*, 62 Tex. 143; *Urbahn v. Martin*, 19 Tex. Civ. Ap. 93; *Miller v. Sawyer*, 30 Vt. 412; *Aldrich v. Hapgood*, 39 Vt. 617; *West v. Belches*, 5 Munf. (Va.) 187; *McMahon v. Fawcett*, 2 Rand. (Va.) 514, 14 Am. D. 796; *Neely v. Bee*, 32 W. Va. 519; *In re Koch's Est.*, 148 Wis. 548, and cases throughout this chapter. The right of subrogation arises whether the security was taken before the co-surety or any of the sureties became bound, or afterward, and whether the surety claiming subrogation knew of it or not. *Hoover v. Mowrer*, *supra*; *Steel v. Dixon*, L. R. 17 Ch. D. 825.

6. *In re Arcadeckne*, 24 Ch. D. 709.

7. *Ante*, sec. 150, et seq.; *Lacy v. Rollins*, 74 Tex. 566; *Somers v. Johnson*, 57 Vt. 274; *Farmers' Bank v. Teeters*, 31 Oh. St. 36; *McCune v. Belt*, 45 Mo. 174, 179.

subrogated to collaterals held by his co-surety from a stranger;⁸ nor does the rule of subrogation apply where, after the sureties have paid their respective shares, the principal sees fit to transfer property or securities to one or some of them, unless there is something to show that he intended them for the common indemnity of the several sureties rather than that of him or those to whom the transfer was made. In the absence of such a showing, it is nothing more than a preference over other creditors of those receiving such transfer and must stand or fall as such.⁹ So it has been held upon similar principles that if one of two sureties has actually paid the debt for which both were liable, he may recover of the other surety half the amount thereof, although after such payment he may have been repaid by the principal the other half, expressly for his separate indemnity.¹⁰ If by agreement between themselves, however, any sums received or securities obtained by any of them are to inure to the benefit of all, such agreement will be enforced.¹¹

The obligation of a co-surety to preserve and apply securities for the common benefit however, has been held to exist in spite of the fact that they were obtained by his own exertions, or that the principal intended them for his sole benefit.¹² But where a surety, when he be-

8. *Leggett v. McClelland*, 39 Oh. St. 624. And see *Pfuger v. Wilshusen*, 17 N. Y. Supp. 516; In *Shaeffer v. Clendenin*, 100 Pa. 565, a judgment against the principal in favor of his wife was assigned by her with his concurrence to one of the sureties as collateral and it was held that it inured to the benefit of his co-surety. There was a finding, however, that the assignment was intended for the benefit of both sureties.

9. *Urbahn v. Martin*, 19 Tex. Civ. App. 93, 97; *Messer v. Swan*, 4 N. H. 481; *Hall v. Cushman*, 16 N. H. 462, 43 Am. D. 562n; *Allen v. Wood*, 3 Ired. Eq. (N. Car.) 386; *Harrison v. Phillips*, 46 Mo. 520; *Cramer v. Redman*, 10 Wyo. 328.

10. *Gould v. Fuller*, 18 Me. 364, 36 Am. D. 727.

11. *Cramer v. Redman*, 10 Wyo. 328; *Smith v. Hicks*, 5 Wend. (N. Y.) 48; *Phillips v. Preston*, 5 How. (U. S.) 278.

12. *Steel v. Dixon*, 17 Ch. Div. 825; *Cannon v. Connaway*, 5 Del. Ch. 559; *Hartwell v. Whitman*, 36 Ala. 712; *Peoples State Bank v. Miller*, 85 Kan. 272; *Fuller v. Haggood*, 39 Vt. 617, 620;

comes such, stipulates for and obtains in good faith separate indemnity from his principal, as a condition of his suretyship it has been laid down that he may hold it as his own exclusively, and his co-sureties can claim only so much of the proceeds as are left after he has been fully indemnified.¹³

Where the right of subrogation exists it is for the full indemnification of all the sureties unless the security is sooner exhausted. Thus where a policy of insurance was assigned by the principal to one of five co-sureties, all of whom paid four hundred pounds on a debt of two thousand pounds, it was held that each sum collected thereon must be shared proportionately among all the sureties until such policy was exhausted or four hundred pounds had been paid to each in full.¹⁴

§ 169. Subrogation of Surety to Rights of Creditor Against Co-Sureties. A surety who has paid the whole, or more than his just proportion of the common debt, will be subrogated in most states to all the remedies, liens and priorities of the creditor as well against his co-sureties

Mueller v. Barge, 54 Minn. 314; Carpenter v. Kelly, 9 Oh. 106; Hoover v. Mowrer, 84 Ia. 43, 35 Am. St. R. 293. If the surety against whom contribution is sought consented to his own exclusion from the benefit of securities given his co-sureties, he has no right to participate in them. Fishback v. Weaver, 34 Ark. 569; Moore v. Moore, 3 Hawks (N. Car.) 358; See White v. Banks, 21 Ala. 705, 56 Am. D. 282.

13. Moore v. Moore, 4 Hawks (N. Car.) 358, 15 Am. D. 523 and note; Thompson v. Adams, 1 Freem. (Miss.) 225. Compare Ante, secs. 159, 168; Steel v. Dixon, 17 Ch. Div. 829 and cases in the note above; 1 Brandt Sur. & Guar. (3rd Ed.) sec. 294 quoted in People's State Bank v. Miller, supra, to the effect that a taking of separate indemnity is a fraud on co-sureties and security so taken inures to the common benefit.

14. Berridge v. Berridge, 44 Ch. D. 168. Where a surety on two notes took collateral security against his liability on both of them, and his co-surety against liability on the last, the plaintiff who was co-surety on the first note only was held entitled to have it applied pro rata on the obligation for which he was bound. Mueller v. Barge, 54 Minn. 314; Brown v. Ray, 18 N. H. 102, 45 Am. D. 361. See also Moore v. Moberly, 7 B. Monr. (Ky.) 299. Compare Titcomb v. McAllister, 81 Me. 399.

to the extent of their liability to contribute, as against the principal debtor as to the whole debt.¹⁵ Whether the right extends to the original obligation or only to collaterals is the subject of the same conflict as where the surety claims subrogation from the principal direct. By the great weight of authority, as we have seen, he is entitled to all such remedies and securities, direct and collateral.¹⁶ And by the weight of authority also the co-surety who pays the whole debt or more than his share of it is likewise entitled to stand, if it is fully discharged, in the same rank as the creditor, as against his co-sureties.¹⁷ Thus, a co-surety paying a judgment against the principal and all the sureties is entitled to be subrogated to the rights of the creditor under the judgment to enforce reimbursement from the principal and contribution from his co-sureties, particularly if he has taken an assignment thereof,¹⁸ and to any lien upon the lands of the

15. Sheldon on Subrogation, (2nd Ed.) secs. 140, 179; Brandt Sur. & Guar. (3rd Ed.) sec. 342; Lidderdale v. Robinson, 2 Brock (U. S.) 159; Hull v. Meyers, 90 Ga. 674; Wright v. Grover & Baker Sewing Mach. Co., 82 Pa. St. 80; Fleming v. Beaver, 2 Rawle (Pa.) 128, 19 Am. D. 629; Croft v. Moore, 9 Watts. (Pa.) 451; Cuyler v. Ensworth, 6 Paige (N. Y.) 32; Hess' Estate, 69 Pa. St. 272; German Am. Sav. Bank v. Fritz, 68 Wis., 390; Pierce v. Garrett, 65 Ill. App. 682; Felton v. Bissell, 25 Minn. 15. Compare Bowditch v. Green, 3 Met. (Mass.) 360.

16. See ante, secs. 140, 141.

17. Lidderdale v. Robinson, 2 Brock. (U. S.) 159; Howell v. Reams, 73 N. Car. 391; Hess Est., 69 Pa. St. 272; Croft v. Moore, 9 Watts (Pa.) 451; Burrows v. McWhann, 1 Des. Eq. (S. Car.) 409; Hull v. Myers, 90 Ga. 674; Wright v. Grover & Baker S. Mach. Co., 82 Pa. St. 800; German Am. Sav. Bank v. Fritz, 68 Wis. 390. See the Mercantile Law Amendment Act quoted ante, sec. 140, note 59, Kentucky Statutes, secs. 2666, 2667; Wiedeman v. Crawford, 149 Ky. 202 and statutes in several of the states permitting sureties paying a judgment, on motion, or otherwise in summary proceedings, to have execution thereon against principal or co-sureties for indemnity or contribution.

18. Mason v. Pierron, 69 Wis. 585; German Am. Sav. Bank v. Fritz, supra; Croft v. Moore, 9 Watts. Pa. 451; Peebles v. Gray, 115 N. Car. 38, 44 Am. St. R. 429; Smith v. Rumsey, 33 Mich. 183; Furnold v. Bank, 44 Mo. 336; Ante, sec. 140.

principal and co-sureties that such a judgment creates.¹⁹ So a surety on a joint and several obligation in which there was a warrant to confess judgment, having paid the debt in full, was held entitled to enter judgment thereon to his own use and have execution against his co-surety for the latter's proportion;²⁰ and a surety who is liable jointly on a judgment, or jointly or jointly and severally with his co-sureties upon a specialty may, by the weight of authority, rank as a judgment or specialty creditor in obtaining contribution from them.²¹

§ 170. Same—Subrogation of Surety to Creditor's Rights as Against Estate of Insolvent Co-Surety. Where a surety pays the entire debt, he may prove against the estate of his insolvent co-surety, not for one half the debt merely but for the whole of it, and may receive dividends under such proof up to one half of the amount paid by him. This is upon the theory that the paying surety is subrogated to all the rights and remedies of the principal as against the insolvent co-surety, and, as the principal could have proved for the whole debt, so likewise may the paying surety.²²

19. *Reber v. Gundy*, 13 Fed. Rep. 33; *Furnold v. Bank*, supra; *Smith v. Rumsey*, supra; *Hill v. King*, 48 Oh. St. 75; *Dempsey v. Bush*, 18 Oh. St. 376; *German Am. Sav. Bank v. Fritz*, supra.

20. *Wright v. Grover & Baker Sewing Mach. Co.*, 82 Pa. St. 80.

21. *Sheldon on Subrogation*, (2nd Ed.) sec. 179. Practically the same principles apply and the same conflict exists here as in the case of a surety co-obligor seeking reimbursement from the principal, and the cases on contribution are often cited interchangeably with those involving indemnification. See *Ante*, secs. 140, 165; *Wright v. Grover & Baker Sewing Mach. Co.*, supra, and cases cited and discussed; *U. S. v. Bunker*, 4 Wash. (C. C.) 446; *Blackman v. Joiner*, 81 Ala. 344; *Martindale v. Brock*, 41 Md. 571; *Kimmell v. Lowe*, 28 Minn. 265; *Eaton v. Lambert*, 1 Neb. 339; *Brought v. Griffith*, 16 Ia. 26, 35; *German Am. Sav. Bank v. Fritz*, 68 Wis. 390, 397. In North Carolina, as in actions for reimbursement, the plaintiff must have taken an assignment of the joint obligation from the creditor to a trustee for his use. *Rice v. Hearn*, 109 N. Car. 150; *Peebles v. Gay*, 115 N. Car. 38, 44 Am. St. R. 429. See *Lisles v. Rogers*, 113 N. Car. 197, 37 Am. St. R. 627.

22. *Ex parte Stokes*, De Gex 618; *Pace v. Pace*, 95 Va. 792, 44 L. R. A. 459; *Hess v. Hess*, 69 Pa. 272. For contrary rulings see

§ 171. **Duty of Surety to Preserve and Apply Securities Held of Principal for Benefit of Co-Sureties.** If a surety has taken security from the principal debtor, he is regarded as holding it, not for his own benefit alone, but as trustee or quasi trustee for his co-sureties.²³ They are entitled to the benefit of such security or any fund realized therefrom, proportionally, by virtue of their right to indemnity and contribution, and to have it fairly and honestly applied.²⁴ If, however, the property or securities of the principal lost, released or misapplied by the surety who holds them, are insufficient in value to cover the debt for which contribution is sought by him he will be entitled to contribution for the balance. It follows from this that the surety holding such property or security from the principal cannot, upon paying the whole debt secured, recover contribution of his fellows without showing that the security has been properly disposed of and is insufficient to satisfy the debt for which contribution is sought.²⁵ He is bound, upon the theory of his trusteeship, for ordinary care and due and proper diligence to guard the security against depreciation or loss,²⁶ and if

New Bedford Inst. for Sav. v. Hathaway, 134 Mass. 69, 45 Am. R. 289; Apperson v. Wilbourn, 58 Miss. 439; Maxwell v. Herron, 3 Ross L. C. 129, 3 Paton, 350.

23. Ante. sec. 168; Copis v. Middleton, T. & R. 231; Hall v. Robinson, 8 Ired. Law (N. Car.) 56; Hilton v. Crist, 5 Dana (Ky.) 384; Leggett v. McClelland, 39 Ohio St. 624; Carpenter v. Kelly, 9 Ohio 106; McCune v. Belt, 45 Mo. 174; Hinsdill v. Murray, 6 Vt. 136. In re Koch's Est., 148 Wis. 548.

24. Hall v. Robinson, supra; Simmons v. Camp, 71 Ga. 54; Hoover v. Mowrer, 84 Ia. 43, 35 Am. St. R. 293; Sanders v. Weelburg, 107 Ind. 266. In the case last cited the surety in a judgment sued out execution against his principal and bought in the latter's property at the sale at a merely nominal price. Held, in his suit against co-sureties, for contribution, that they were not liable where the property in question fairly disposed of would have realized the debt. See also Livingston v. Van Rensselaer, 6 Wend. (N. Y.) 63.

25. Davis v. Toulmin, 77 N. Y. 280; Neely v. Bee, 32 W. Va. 619; Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. D. 92; Chilton v. Chapman, 13 Mo. 470; Hall v. Robinson, supra.

26. Paulin v. Kaighn, 29 N. J. L. 480; Taylor v. Morrison, 26 Ala. 728, 62 Am. D. 747; Ramsey v. Lewis, 30 Barb. (N. Y.) 403;

he fails in this respect, or to diligently and faithfully apply it to the debt, he is chargeable with its value in the adjustment with his co-sureties.²⁷

As a trustee for his co-sureties the surety holding securities has the ordinary rights of a trustee and is entitled, in determining the amount due him, to credit for whatever he may have necessarily or prudently expended beyond his proportionate share, in obtaining and preserving the securities in question or in defending the title thereto.²⁸

Crisfield v. Murdock, 127 N. Y. 315; In re Koch's Est., 148 Wis. 548.

27. Kerns v. Chambers, 3 Ired Eq. (N. Car.) 596; Goodloe v. Clay, 6 B. Monr. (Ky.) 236; Sanders v. Weelberg, 107 Ind. 266; In re Koch's Est., supra. In the case last cited one of several co-sureties for the debts of a corporation obtained practical control thereof under circumstances showing that the corporation was wholly solvent, and shortly afterward it proved badly insolvent, the presumption was held to arise, in the absence of explanation, that he has breached his duty toward the corporation and his co-sureties so as to preclude him from contribution from the latter.

28. Hoover v. Mowrer, 84 Ia. 43, 35 Am. St. R. 293; Livingston v. Van Rensselaer, 6 Wend. (N. Y.) 63; Comegys v. State Bank, 6 Ind. 357; White v. Banks, 21 Ala. 705, 58 Am. D. 283. Where a surety holding a mortgage is forced to buy in or discharge a prior mortgage he is entitled to an allowance against his co-sureties for the amount paid to discharge the prior lien. Comegys v. State Bank, supra.

But no allowance should be made for unnecessary expenses unless the co-sureties consent. Comegys v. State Bank, supra; John v. Jones, 6 Ala. 457. See also Caldwell v. Campeau, 3 Dom. L. Rep. 555, citing Ludd v. Chamber of Commerce, 60 Pac. 713 holding that, a surety under a contractors bond who advances money or delivers material to the principal to enable him to complete the contract and prevent a breach of the bond, cannot have contribution from his co-sureties on account of such money or materials.

CHAPTER XVI.

SURETY'S RIGHT TO SEND CREDITOR AGAINST THE PRINCIPAL OR TO COMPEL PRINCIPAL TO EXONERATE HIM. SUBROGATION OF CREDITOR TO SURETY'S SECURITIES.

§ 172. **Surety's Right at Law to Compel Creditor to Sue Surety—the Rule of *Pain v. Packard*.** By the decided weight of authority, neither a strict surety nor an absolute guarantor is released, in the absence of statute, by mere notice to the creditor to sue the principal, and the creditor's refusal or neglect to do so, though the principal was then solvent and afterward failed. The reasons commonly given for this rule are that mere passive indulgence to the principal affords the surety no ground for complaint for the surety may at any time pay the debt himself and proceed immediately against the principal for reimbursement, and that to permit the surety to thus control the actions of the creditor, at least without resort to a court of equity, would be in many cases both mischievous and oppressive, and is without support in authority or justice;¹ nor is it, we may add, within the terms of the contract of a surety or absolute guarantor of payment or performance that the creditor shall, even upon notice, proceed against the principal debtor.²

1. Post, secs. 176, 177; *Harris v. Newell*, 42 Wis. 687. As to mere inaction of the creditor or passive indulgence to the principal see Post, sec. 224.

2. In support of this rule see 1 Brandt, Sur. & Guar. (3rd Ed.) sec. 265; *Ellis v. Jones*, 1 How. (U. S.) 451; *Executors of Dennis v. Rider*, 2McL. 451; *Dane v. Corduan*, 24 Cal. 157, 85 Am. D. 53; *Bull v. Allen*, 19 Conn. 101; *Wilds v. Attix*, 4 Del. Ch. 253; *Howard v. Brown*, 3 Ga. 523; *Taylor v. Beck*, 13 Ill. 376; *Carr v. Howard*, 8 Blackf. (Ind.) 190; *Halstead v. Brown*, 17 Ind. 202; *Miller v. Arnold*, 65 Ind. 488; *Ingels v. Sutliff*, 36 Kas. 444; *Goodacre v. Skinner*, 47 Kas. 575, 579; *Stout v. Ashton*, 5 B. Monr. (Ky.) 251; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Boutte v. Martin*, 16 La.

By the common law of a few states, however, the surety is released if, after the debt is due, he notifies the creditor to sue the principal, who is then solvent, and the creditor neglects to do so until insolvency occurs. This doctrine appears to have originated in New York in the case of *Pain v. Packard*,³ and seems to have been followed without qualification in Alabama,⁴ and is confirmed by the code.⁵ It also prevails in Arkansas, and is confirmed there by statute.⁶ In Colorado the rule of *Pain v. Packard* has also been followed,⁷ and it has been adopted in Pennsylvania and Tennessee with the qualification that the notice to sue the principal must be ac-

133; *La. Bank v. Le Doux*, 3 La. An. 674; *Page v. Webster*, 15 Me. 249, 33 Am. D. 608; *Eaton v. Waite*, 66 Me. 221; *Sasscer v. Young*, 6 Gill & J. (Md.) 243, 249; *Gray v. Farmer's Bank*, 81 Md. 631, 643; *Haydenville Bank v. Parsons*, 138 Mass. 53; *Inkster v. First Bank*, 30 Mich. 143; *Michigan Co. v. Soule*, 51 Mich. 312; *Routon v. Lacy*, 17 Mo. 399; *Freligh v. Ames*, 31 Mo. 253; *Smith v. Freyler*, 4 Mont. 489, 47 Am. R. 358; *Quillen v. Quigley*, 14 Nev. 215; *Morrison v. Citizens' Bank*, 65 N. H. 253, 280, 23 Am. St. R. 39 and cases cited; *Manning v. Shotwell*, 2 South. (N. J. L.) 584, 8 Am. D. 622; *Pinterd v. Davis*, *Spencer* (N. J. L.) 205, 1 Zab. (N. J. L.) 632, 47 Am. D. 172; *Thompson v. Bowne*, 39 N. J. L. 2; *First Bank v. Homesley*, 99 N. Car. 531; *Jenkins v. Clarkson*, 7 Ohio 72; *Findley v. Hill*, 8 Oreg. 247, 34 Am. R. 578-n; *Pickett v. Land*, 2 Bail. (S. Car.) 608; *Caston v. Dunlap*, Rich. Eq. Cas. (S. Car.) 77, 23 Am. D. 194; *Hubbard v. Davis*, 1 Aik. (Vt.) 296; *Hogaboom v. Herrick*, 4 Vt. 131; *Baker v. Marshall*, 16 Vt. 522, 42 Am. D. 528; *Hickok v. Farmers' Bank*, 35 Vt. 476; *Croughton v. Duval*, 3 Call. (Va.) 59; *Harris v. Newell*, 42 Wis. 687.

3. 13 Johns. (N. Y.) 174; 7 Am. D. 369; *Remsen v. Beekman*, 25 N. Y. 552; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. R. 90; and cases cited and commented on in the opinion. See also *Warner v. Beardsley*, 8 Wend. (N. Y.) 194, and note to *Pain v. Packard*, in 7 Am. D. 367, 370, and 2 Am. Lead Cas. 367, and comments thereon in *Harris v. Newell*, 42 Wis. 687.

4. *Bruce v. Edwards*, 11 Stew. (Ala.) 11, 18 Am. D. 33; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9.

5. *Howle v. Edwards*, 97 Ala. 649, and cases cited and sec. 3153 of the code.

6. *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. D. 696; *Thompson v. Robinson*, 34 Ark. 44.

7. *Martin v. Skehan*, 2 Col. 614.

accompanied by the declaration that the surety will not continue liable unless the notice is obeyed.⁸

The rules established by the foregoing cases must be distinguished from the equitable rule that permits the surety, by suit in equity, to quicken the steps of the creditor against the principal, or to compel the principal to pay the debt.⁹ Furthermore, in all the jurisdictions where the surety can at law send the creditor against the principal by notice, whether under the rule in *Pain v. Packard* or by statute, the notice is of no avail to the surety if given before the maturity of the debt,¹⁰ and so at common law and in most states under statutes if the principal and his property are beyond the jurisdiction of the courts of the creditor's state.¹¹

The doctrine of *Pain v. Packard* does not extend to the request of surety for rent to distrain the debtor,¹² nor, it has been held, to a request to enforce a mortgage, for to this the surety may be subrogated upon payment;¹³ or to issue execution upon a judgment already obtained,¹⁴ or to take out administration upon the principal's estate.¹⁵

8. *Cope v. Smith*, 8 S. & R. (Pa.) 110, 11 Am. D. 582; *Hellen v. Crawford*, 44 Pa. 105, 84 Am. D. 421; *Campbell v. Sherman*, 151 Pa. 70, 31 Am. St. R. 735; *Conrad v. Foy*, 68 Pa. 381. The last case holds that the husband of the legatee of a deceased surety cannot give the notice where there is a personal representative. *Jackson v. Huey*, 10 Lea (Tenn.) 184, 43 Am. R. 301.

9. Post, secs. 176, 177.

10. *Hunt v. Purdy*, 82 N. Y. 486 (semble), 37 Am. R. 587; *Hellen v. Crawford*, 44 Pa. 105, 84 Am. D. 421; *Fidler v. Hershey*, 90 Pa. 363.

11. *Davis v. Hatcher*, 1 Woods, C. C. 456; *Warner v. Beardsley*, 8 Wend. (N. Y.) 194; *Hightower v. Ogletree*, 114 Ala. 94; *Alcorn v. Com.*, 66 Pa. 172; *Seattle Co. v. Haley*, 6 Wash. 302, 36 Am. St. R. 156. But see *Hayward v. Fullerton*, 75 Ia. 371; *Meridan Co. v. Flory*, 44 Oh. St. 430.

12. *Ruggles v. Holden*, 3 Wend. (N. Y.) 216; *Brooks v. Castor*, 36 Ala. 682.

13. *Branch Bank v. Perdue*, 3 Ala. 409; *Haden v. Brown*, 18 Ala. 641. Contra. *Remsen v. Beekman*, 25 N. Y. 552; *Souter v. Bank*, 94 Ga. 713.

14. *Buckalew v. Smith*, 44 Ala. 638.

15. *Brown v. Flanders*, 80 Ga. 209.

The rule of *Pain v. Packard* seems to be quite strictly confined to technical sureties. Clearly it does not apply to a technical indorser of the law merchant, for his contract is a separate and independent promise to take up the paper if it is not paid at maturity.¹⁶

§ 173. Same—Statutory Provisions. Statutes in perhaps a dozen of our states have put it within the power of the surety to send the creditor against the principal by notice. In the majority of them the notice must be in writing, and in some of them the failure of the creditor to proceed upon notice releases the surety though he is not injured by such failure.¹⁷

In a number of states it is provided in substance that where sureties are sued with the principal they are entitled to have the fact of suretyship determined in the same action, and if the fact of suretyship be found,

16. *Trimble v. Thorne*, 16 Johns (N. Y.) 152, 8 Am. D. 302; *Newcomb v. Hale*, 90 N. Y. 326, 331, 43 Am. R. 173; *First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. R. 66; *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316.

17. See 2 Brandt Sur. & Guar. (3rd Ed.) secs. 771 et seq. where these statutes are discussed. A retiring partner whose associates have assumed the firm debts cannot, by notice under the statute, send the creditor against his fellows. This is upon the ground that the partners could not by agreement inter se, change their relations so as to affect the rights of the creditor, without his consent. *Sharpleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. R. 783. Compare *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. R. 90 and see Ante, sec. 8. Under the Arkansas statute it is held that a surety who is fully indemnified cannot send the creditor against the principal by notice, and that even where no indemnity has been taken sureties are not released by failure of the creditor to obey such notice given by a co-surety, on the ground that the defense so arising is personal to such co-surety. *Wilson v. Tibbetts*, 29 Ark. 579, 21 Am. R. 165. If written notice to sue is required by the statute oral notice is insufficient. *Timmons v. Butler-Stevens Co.*, 74 S. E. 748 (Ga. 1912.) The Illinois statute gives the surety power to send the creditor against the principal by written notice upon penalty of losing recourse, when the surety "apprehends that the principal is likely to become insolvent or to remove from the state." R. S. Ill. (1909) p. 2208, section 1.

execution shall first be levied on the property of the principal.¹⁸

§ 174. Form and Sufficiency of Notice. Under the rule of *Pain v. Packard*, the notice from the surety to the creditor to sue the principal need not be in writing, and it has been held that statutes providing for written notice, though not in peremptory terms, were merely cumulative in states where the rule of that case already prevailed, and did not prevent the discharge of the surety where an oral request was not complied with.¹⁹

The request to sue must be clear and unambiguous.²⁰ It must express something more than a hope, recommendation, suggestion, or desire that the creditor sue.²¹ What amounts to a mere notice to collect of the principal,²² or to dun him, is not sufficient.²³

§ 175. Waiver and Withdrawal of Notice. The creditor may waive written notice where it is required by statute.²⁴ If the surety withdraws his notice to sue, he

18. See *Tex. Rev. Stat.* 1895, articles 3814, 3819 under which this right extends to indorsers.

19. *Thompson v. Watson*, 10 *Yerg. (Tenn.)* 362; *Howle v. Edwards*, 97 *Ala.* 649. Contra, under a statute in a state where the rule of *Pain v. Packard*, had not prevailed. *Souter v. Bank*, 94 *Ga.* 713; *Miller v. Arnold*, 65 *Ind.* 488; *English v. Bourne*, 7 *Bush. (Ky.)* 138.

20. See 1 *Brandt Sur. & Guar. (3rd Ed.)* sec. 263; *Fidler v. Hershey*, 90 *Pa. St.* 363; *Goodwin v. Simonson*, 74 *N. Y.* 133.

21. *Kennedy v. Falde*, 4 *Dak.* 319; *Bethune v. Dozier*, 10 *Ga.* 235; *Hill v. Sherman*, 15 *Ia.* 365; *Baker v. Kellogg*, 29 *Oh. St.* 663; *Parrish v. Gray*, 1 *Humph. (Tenn.)* 88.

22. *Franklin v. Franklin*, 71 *Ind.* 573; *Bowling v. Chambers*, 20 *Col. App.* 113.

23. *Singer v. Troutman*, 49 *Barb. (N. Y.)* 182. See further as to the sufficiency of the notice, or service of notice, *McMillen v. Dearhoff*, 18 *Ind. App.* 428; *English v. Bourne*, 7 *Bush (Ky.)* 138; *Bolton v. Lundy*, 6 *Mo.* 46; *England v. McKamey*, 36 *Tenn.* (4 *Sneed*) 75; *Williams v. Ogg*, 42 *Tex. Civ. App.* 558; *Sparks v. Munson*, 76 *Mo. App.* 83; *McCoy v. Lockwood*, 71 *Ind.* 319. Statutes permitting the surety to compel the creditor to proceed upon notice are strictly construed. *Scales v. Cox*, 106 *Ind.* 261.

24. *McCarter v. Turner*, 49 *Ga.* 309; *Hamblin v. McAllister*, 67 *Ky.* 418; *Clark v. Osborn*, 41 *Oh. St.* 28. Promising to sue upon

is not released by the subsequent inaction of the creditor.²⁵

§ 176. Surety's Right in Equity to Send Creditor Against Principal. The right of the surety by suit in equity, after maturity of the debt, and without paying it himself, to send the creditor against the principal debtor, provided the surety indemnify the creditor against the expense of a fruitless action, has been frequently affirmed and often in the most general terms.²⁶ This is distinct from the rule of *Pain v. Packard* and the rule established by statutes which require notice merely to the creditor, the non-obedience of which releases the surety at law,²⁷ and from the rule of the early civil law which required the principal to be sued before resort could be had to the surety.²⁸ Furthermore, its limitations are, at least in some jurisdictions, more or less doubtful. The bill where it is allowed in such cases, is of course *quia timet* and relief is granted upon the theory that even though the surety may suffer no actual pecuniary loss through the delay of the creditor, it is usually unjust and inequitable that he should be compelled to pay a debt that the principal should discharge in the first instance, or else have the cloud of it hanging over him indefinitely.²⁹ But some authorities refuse to

receipt of oral notice is a waiver. *Taylor v. Davis*, 38 Miss. 493. But see *English v. Bourne*, 7 Bush (Ky.) 138.

25. *Gillilan v. Ludington*, 6 W. Va. 128.

26. See 1 Brandt, Sur. & Guar., sec. 261.

27. Ante, secs. 172, 173; *Harris v. Newell*, 42 Wis. 647.

28. *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123. See also *Meigs* Tennessee Rep. p. 173 note.

29. The following decisions lend direct or indirect support to this right of the surety to send the creditor against the principal. *Ranelaugh v. Hayes*, 1 Term. 189; *Lee v. Rook*, Mosley, 318; *Nisbet v. Smith*, 2 Bro. C. C. 378, 382; *Wooldridge v. Norris*, 6 Eq. 410; *Lloyd v. Dimmack*, 7 Ch. D. 398; *Matthews v. Laurin*, L. R., 31 Ir. 181; Halsb. Laws of Eng., Vol. XV., pp. 506, 507; *In re Babcock*, 3 Story (U. S.) 398; *Humphreys v. Leggett*, 9 How. (U. S.) 297; 21 How. (U. S.) 66; *Merwin v. Austin*, 58 Conn. 22, 24, 7 L. R. A. 84-n; *West v. Chasten*, 12 Fla. 315; *Hayden v. Thrasher*, 13 Fla. 795; *Moore v. Topliff*, 107 Ill. 241; *Street v. Chicago Co.*, 157 Ill.

follow the rule as broadly laid down at the outset, and it has been held that the surety must sue in equity to compel the creditor to sue the principal before the surety himself has been sued at law;³⁰ and it has also been held that the suretyship of the complainant must appear on the face of the instrument of debt,³¹ and that the surety in his bill or declaration must offer, not merely to indemnify the creditor, but to pay any balance that cannot be collected from the principal debtor.³²

§ 177. Equity Will Compel Principal to Pay Creditor at Suit of Surety. Not only will equity in a proper case hasten the steps of the creditor against the principal at the suit of the surety, but upon similar principles, the

605; *Roberts v. American Co.*, 83 Ill. App. 469; *Keach v. Hamilton*, 84 Ill. App. 413; *Ritenour v. Mathews*, 42 Ind. 7, 14; *Medsker v. Parker*, 70 Ind. 509; *Hoppes v. Hoppes*, 123 Ind. 397; *Morrison v. Poyntz*, 7 Dana (Ky.) 307-308, 32 Am. Dec. 92; *Meador v. Meador*, 88 Ky. 217; *Hoffman v. Johnson*, 1 Bland. (Md.) 103, 105; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Bellows v. Lovell*, 5 Pick. 307-310; *Huey v. Pinney*, 5 Minn. 310, 322 (statutory); *Delaware Co. v. Oxford Co.*, 38 N. J. Eq. 151; *Warner v. Beardsley*, 8 Wend. 194, 199; *Gibbs v. Mennard*, 6 Paige (N. Y.) 258; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Hannay v. Pell*, 3 E. D. Sm. (N. Y.) 432; *Ferrer v. Barrett*, 4 Jones Eq. 455; *Miller v. Miller*, Phill. (N. Car.) 85, 88; *Thigpen v. Price*, Phill. (N. Car.) 146; *Stump v. Rogers*, 1 Oh. 533; *McConnell v. Scott*, 15 Oh. 401, 45 Am. Dec. 583; *Hale v. Wetmore*, 4 Oh. 600; *Beaver v. Beaver*, 23 Pa. 167; *Ardesco Co. v. North American Co.*, 66 Pa. 375; *Pride v. Boyce*, Rice's Eq. (S. Car.) 275; *Norton v. Reed*, 11 S. Car. 593; *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. R. 684; *Washington v. Taite*, 3 Humph. (Tenn.) 543, 546; *Howell v. Cobb*, 2 Cold. (Tenn.) 104, 88 Am. Dec. 591; *Greene v. Slarnes*, 1 Heisk. (Tenn.) 582; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Craighead v. Swartz*, 219 Pa. 149; *Bishop v. Day*, 13 Vt. 81; 37 Am. Dec. 582; *Neal v. Buffington*, 42 W. Va. 327; *Harris v. Newell*, 42 Wis. 687, 691. See also *Hayes v. Ward*, 4 Johns Ch. (N. Y.) 123, 8 Am. D. 554; *Compare Woffington v. Sparks*, 2 Ves. 569; *Hall v. Hall*, 34 Ind. 314; *First Nat. Bank v. Wood*, 71 N. Y. 405, 411; *Croughton v. Duval*, 3 Call. (Va.) 69; *Mead v. Grigsby*, 26 Gratt. (Va.) 612; *Penn v. Ingles*, 82 Va. 65.

30. *Hayes v. Ward*, *supra*.

31. *In re Babcock*, 3 Story (U. S.) 398.

32. *In re Babcock*, *supra*. As to the right of the surety to compel the creditor to exhaust collaterals held by the principal before applying to the surety or his property; see Post, sec. 179.

surety may sue quia timet in equity, after the principal is in default, to compel him to pay the creditor for the exoneration of the surety, though the surety has paid nothing himself.³³ It seems unnecessary in such cases that judgment shall have been rendered against the surety, or that he shall have been otherwise molested by the creditor to entitle him to thus sue.³⁴ In these cases both principal and creditor should be parties to the bill.

§ 178. Rights of Surety Under Express Contract of Indemnity. It has been seen that a surety may, in general, make whatever express contract he will with the principal touching his indemnification by the latter,³⁵ and where the principal has expressly covenanted to indemnify the surety, there is no doubt that the surety may proceed in equity to enforce exoneration or indemnity before paying anything on account of the debt.³⁶

33. Brandt Sur. & Guar. (3rd Ed.) sec. 243; 3 Pom. Eq. Jur. sec. 1417; Lee v. Rook, Mosley, 318; Ranelagh v. Hayes, 1 Vern. 189; Nisbet v. Smith, 2 Bro. C. C. 582; Ascherson v. Tredegar Dry Dock & Wharf Co., (1909) L. R., 2 Ch. 404, and cases cited; Beaver v. Beaver, 23 Pa. St. 167; Gibbs v. Mennard, 6 Paige (N. Y.) 258; Warner v. Beardsley, 8 Wend. (N. Y.) 194; Holcomb v. Fetter, 70 N. J. Eq. 300; Neal v. Buffington, 42 W. Va. 323; Cooper v. National Fertilizer Co., 132 Ga. 529; Carr v. Davis, 64 W. Va. 522, 20 L. R. A. (N. S.) 58; Bishop v. Day, 13 Vt. 81, 37 Am. D. 582; Poe v. Dixon, 60 Oh. St. 133, 71 Am. St. R. 713; Dobie v. Fidelity & Guar. Co., 95 Wis. 540, 60 Am. St. R. 135, with which compare Ellis v. Land Co., 108 Wis. 313. This remedy is doubtless open to a corporate compensated surety. See Pavarini v. Title Guar. Co., 36 App. Cas. (D. C.), 348 and the note thereto in Am. Ann. Cas. 1912, c., collecting a multitude of cases in support of the text. Roberts v. Am. Bonding Co., 83 Ill. App. 363. As denying the right of a surety in advance of payment to sue in equity to compel his principal to pay, see McElroy v. Hatheway, 44 Mich. 399; Nash v. Burchard, 87 Mich. 85.

34. Wendlandt v. Sohre, 37 Minn. 162. This principle, says Mr. Brandt, is universally recognized and has been applied to a great variety of circumstances. Brandt Guar. & Sur., supra, and cases cited and discussed; Hutchinson Grocer Co. v. Brand, 79 Kan. 340; Irick v. Black, 17 N. J. Eq. 189.

35. Ante, secs. 117, 131.

36. Story Eq. Jur., sec. 850, citing Lee v. Rook, Mosley, 318; Pember v. Mathers, 1 Bro. Ch. 53; Champion v. Brown, 6 John. Ch. 405, 406.

§ 179. **Right of Surety to Have Creditor Resort to Securities Given Him by Principal.** Generally, in the absence of special agreement, the technical surety or absolute guarantor has no right at common law, by notice to the creditor to insist that the creditor resort to securities given him by the principal debtor or proceed actively to enforce them, before resorting to the surety or to any property that he may have pledged or mortgaged as security for the debt, on pain of losing his recourse against the surety. The surety's remedy in such cases is to pay the debt himself, whereupon he becomes subrogated for his reimbursement to all the rights of the creditor against the principal and against the principal's property pledged or mortgaged to the creditor for the debt.³⁷

In equity, however, where the separate property of both principal and surety, or their separate interests in the same property, are given as security for the debt, the surety may, after default and without payment, insist that the creditor resort to the property or interests of the principal before coming upon that of the surety.³⁸

Where specific security is held by the creditor from the principal alone, however, the authorities are somewhat conflicting as to the right of the surety by a proceeding in equity to compel the creditor to exhaust the securities of the principal before calling upon the surety to pay. By the apparent weight of authority he has no such right in the absence of agreement or special equi-

37. Post, sec. 224; 1 Brandt, Sur. & Guar. (3rd Ed.) sec. 260 Bingham v. Mears, 4 N. Dak. 437, 27 L. R. A. 257, and cases cited; Hays v. Ward, 4 Johns Ch. (N. Y.) 123, 8 Am. D. 554; Kissire v. Plunkett-Jarrell Grocer Co., 102 Ark. —.

38. Pacific Guano Co. v. Anglin, 82 Ala. 492; Gresham v. Ware, 79 Ala. 192; Kempner v. Dooley, 60 Ark. 526; Hoppes v. Hoppes, 123 Ind. 401, and cases cited; Weil v. Thomas, 114 N. Car. 197, and cases cited; Kidd v. Hurley, 54 N. J. Eq. 177; Vartie v. Underwood, 18 Barb. (N. Y.) 561; Neimiciewicz v. Gahn, 3 Paige (N. Y.) 614, 11 Wend. (N. Y.) 312; Wheelright v. Depeyster, 4 Edw. Ch. (N. Y.) 232; Keel v. Levy, 19 Oreg. 450; Bingham v. Mears, 4 N. Dak. 61; Compiled Laws of N. Dak. sec. 4310.

table circumstances.³⁹ A few authorities, however, appear to hold that the surety has this right independent of contract or special equitable circumstances.⁴⁰

What will constitute such special equitable circumstances as will justify a court of equity in compelling the creditor to exhaust the securities of the principal before coming upon the surety is not the subject of any fixed or certain rule. It has been held in New York that where the surety claimed that the security for the debt had been made doubtful and precarious by the illegal act of the creditor himself, he would be forced to litigate the question with the principal or to exhaust his remedy against him before coming upon the surety.⁴¹

39. *Bingham v. Mears*, 4 N. Dak. 437, 27 L. R. A. 257, citing and reviewing many authorities; *Fuller v. Lohring*, 42 Me. 481; *Thorn v. Pinkham*, 84 Me. 101, 30 Am. R. 335-n; *Morrison v. Bank*, 65 N. H. 253, 9 L. R. A. 282, 23 Am. St. R. 39; *Abercrombie v. Knox*, 3 Ala. 728, 37 Am. Dec. 721; *Allen v. Woodworth*, 125 Mass. 400, 28 Am. R. 250; *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92; *Freehold Co. v. Brick*, 37 N. J. Law 307; *Day v. Elmore*, 4 Wis. 190-198; *Buck v. Sanders*, 1 Dana (Ky.) 187; *Penn v. Ingles*, 82 Va. 65; *Aultman v. Smith*, 52 Mo. App. 351; *Davis v. Patrick*, 6 C. C. A. 632, 57 Fed. 909; *Lee v. Griffin*, 31 Miss. 632; *Smith v. First Nat. Bank*, 135 N. Y. Supp. 985, 151 App. Div. 317. As to the civil law doctrine of discussion by which the creditor is bound to make his debt out of the property of the principal before coming upon the surety, see *Domat*, Civ. L., 3, 4, 14, *Merrick's La. Civ. Code*, sec. 3045 et seq.

40. *Spaulding v. Susquehanna County Bank*, 9 Pa. St. 28; *Gastonia v. McEntee etc. Co.*, 131 N. Car. 359; *Hatcher v. Hatcher*, 1 Rand. (Va.) 53; *Wright v. Austin*, 56 Hun (N. Y.) 113; *Shepard v. Connely*, 9 N. Y. Supp. 777. See *Gary v. Cannon*, 3 Ired. Eq. (N. Car.) 64 where it is said that the last rule can never apply unless the security is a valid one upon which the creditor can have plain, speedy and certain redress. See also, *Irick v. Black*, 17 N. J. Eq. 189; *Philadelphia Co. v. Little*, 41 N. J. Eq. 519; *State v. Mellette*, 21 So. Dak. 407, decided under Rev. Civ. Code, sec. 2006.

41. *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. D. 554. See also *Philadelphia Co. v. Little*, supra; *St. Croix Timber Co. v. Joseph*, 142 Wis. 55; *Patton v. Carr*, 117 N. Car. 176. The fact that the surety knew of the existence of the security and became bound in reliance upon it to the knowledge of the creditor, creates no special equity in favor of the surety. *First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. R. 66.

As a general rule a surety cannot, before payment and before the maturity of the debt, insist that collaterals be sold even though they are in danger of depreciation,⁴² nor can he have a receiver appointed for the property of the principal.⁴³ He may, however, if the principal be dead, bring an equitable proceeding to compel administration in his own interest and that of other creditors who desire to come in and share the expense.⁴⁴

§ 180. **Exoneration of Surety by Co-Surety.** By the common law no action for contribution lay until the surety demanding it had actually paid more than his share of the debt,⁴⁵ though by the custom of London and perhaps some other cities, the surety or other co-debtor might sue before payment to compel his fellows to contribute ratably for his relief, at least after judgment against him.⁴⁶ But chancery, it seems, proceeding upon principles similar to those that give the surety a right in equity to compel his principal to exonerate him, have granted relief *quia timet*, before he has paid his share. Thus, in *Wolmershausen v. Gullick*,⁴⁷ it was held, that a surety against whom a judgment had been obtained for the whole debt, could obtain a declaration of his own right to contribution in chancery, and by making the creditor a party to the action obtain an order upon the co-surety to pay to the creditor such co-surety's proportion of the debt; and that where the creditor was not a party to the action a prospective order directing the co-surety, upon payment by the plaintiff of his own

42. *Campbell v. McComb*, 3 Johns. Ch. (N. Y.) 534. But see *Henry v. Compton*, 2 Head. (Tenn.) 549; *Polk v. Gallant*, 2 Dev. & Bat. Eq. (N. Car.) 395; *Green v. Crockett*, 2 Id. 390; *Ex p. Pettillo* 80 (N. Car.) 50; *McConnell v. Scott*, 15 Ohio 401, 45 Am. D. 583; See also *Dixon v. Steele*, 2 L. R. Ch. Div. (1901) 602.

43. *Nash v. Burchard*, 87 Mich. 85, (1891).

44. *Stephenson v. Taverners*, 9 Gratt. (Va.) 398.

45. *Ante*, sec. 154.

46. See *Rastell's Entries* (1st Ed.), Fol. 160, extracted in *Ames Cases on Suretyship*, p. 586; *Offley v. Johnson*, 2 Leonard, pl. 202; *Wolmershausen v. Gullick*, L. R. 1893, 2 Ch. 514.

47. *Supra*.

share of the common liability, to indemnify the latter against further liability.⁴⁸

§ 181. Subrogation of Creditor to Securities Held by Surety. Where the surety holds security from the principal debtor as indemnity against payment of the debt, the creditor, upon default, is quite generally held to be immediately entitled to the benefit thereof under the doctrine of subrogation, upon the theory that securities thus given are held in trust for the ultimate payment of the debt,⁴⁹ though in some states the creditor's right to such securities arises, it seems, only after judgment against the surety.⁵⁰ Where, however, the security appears to have been given for the sole purpose of saving the surety harmless, or for his personal indemnity, rather

48. See, also *Ascherson v. Tredegar Dry Dock etc. Co.*, 1909, 2 Ch. 401.

49. Ante, sec. 133; 1 *Brandt Sur & Guar.* (3rd Ed.) sec. 357, and cases cited; *Sheldon on Subrogation* (2nd Ed.), sec. 154. A multitude of cases in support of this rule are collected in the note to *Maure v. Harrison*, (1 *Eq. Cas. Abr.* 93 pl. 5), in *Ames Cas. on Sur.* 620, 621. In this case it was broadly laid down that a bond creditor shall in equity have the benefit of all counter bonds or collateral security, given by the principal to the surety; as if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt. Compare *Ex p. Waring*, 19 *Ves.* 345 with *In re Walker*, (1892) 1 Ch. 621, where *Maure v. Harrison* is examined and declared not to be authority for the proposition just stated. In support of the text, however, see particularly *Keller v. Ashford*, 133 U. S. 610, 622; *Willard v. Wood*, 135 U. S. 309; *Hampton v. Phipps*, 108 U. S. 260, (obiter); *Leggett v. McClelland*, 39 *Oh. St.* 624; *McDougall v. Walling*, 21 *Wash.* 478, 75 *Am. St. R.* 849; *McCullom v. Hinckley*, 9 *Vt.* 143; *Morrill v. Morrill*, 53 *Vt.* 74; *Forrests Exrs. v. Luddington*, 68 *Ala.* 1; *Burnside v. Fetzner*, 63 *Mo.* 107; *First Nat. Bank v. Davis*, 87 *Mo. App.* 242; *Harland Co. v. Whitney*, 65 *Neb.* 105, 101 *Am. St. R.* 610; *Union Nat. Bank v. Rich*, 106 *Mich.* 319; *Penderrey v. Allen*, 50 *Oh. St.* 121, 19 *L. R. A.* 367; *Chambers v. Prewitt*, 172 *Ill.* 615; *Taylor v. Farmers Bank*, 87 *Ky.* 398; *Long v. Miller*, 93 *N. Car.* 227 and cases cited. See on this general subject 1 *Harv. L. Rev.* 326.

50. *Ohio Life Ins. Co. v. Reeder*, 18 *Oh.* 35; *Grant v. Ludlow*, 8 *Oh. St.* 1; *Importers Bank v. McGhee*, 88 *Ga.* 702; *Pool v. Doster*, 59 *Miss.* 258. See also, *Homer v. Savings Bank*, 7 *Conn.* 478, denying the creditor subrogation where the surety was indebted to the principal to an amount equal to the debt secured.

than for the security of the debt or its protection or payment generally, many cases hold that the equity of subrogation does not exist in favor of the creditor,⁵¹ unless the parties personally liable for the debt become insolvent, whereupon it seems the equity of the creditor attaches itself to the securities in the hands of the surety, though they were given for the personal indemnity of the surety rather than for the general security of the debt.⁵² Even in the latter case the creditor may waive his right to them by proving his debt as an unsecured one against the estates of those who are liable therefor.⁵³

Where the right of the creditor to be subrogated to securities held by the surety of the principal debtor exists, it makes no difference that the securities were taken without the creditor's knowledge or after the credit was given.⁵⁴ But the creditor's right of subrogation does not extend to securities held by the surety from a stranger, or even from a cosurety, unless they were given specially in trust for the payment of the debt.⁵⁵

§ 182. Same—Release by Surety of Securities Held of Principal. Where the security given the surety by the

51. See *Jones v. Quinnipiack Bank*, 29 Conn. 25; *Osborne v. Noble*, 46 Miss. 449; *Henderson-Achert Co. v. John Shillito Co.*, 64 Oh. St. 236, 83 Am. St. R. 745; *Taylor v. Farmers Bank*, 87 Ky. 398; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. D. 549. This distinction has in some cases been repudiated or overlooked. See *Ijames v. Gathier*, 93 N. Car. 362.

52. *Jones v. Quinnipiack Bank*, *supra*; *Bank v. Jenkins*, 64 N. Car. 719; See *Ex p. Morris*, *In re Foye*, 2 Lowell 224, 16 N. B. R. 572, 573 and cases cited.

53. *Loder's Case*, L. R. 6 Eq. 491; *New Bedford Sav. Inst. v. Fairhaven Bank*, 9 Allen (Mass.) 175. The right of the creditors rests upon the doctrine of subrogation and whatever discharges the surety discharges the securities, leaving nothing to which the creditor can be subrogated. 1 *Ex p. Morris*, *In re Foye*, *supra*.

54. 1 *Brandt Sur. & Guar.* (3rd Ed.) sec. 357, and cases cited. *Hopewell v. Bank*, 10 Leigh (Va.) 206; *McCullum v. Hinckley*, 9 Vt. 143; *Leggett v. McClelland*, 39 Oh. St. 624; *Bank v. Rich*, 106 Mich. 319, 329; *Curtis v. Tyler*, 9 Paige (N. Y.) 432.

55. *Hampton v. Phipps*, 108 U. S. 260; *Macklin v. Northern Bank*, 83 Ky. 315; *Taylor v. Farmer's Bank*, 87 Ky. 398; *Seward v. Huntington*, 94 N. Y. 104; *McGoffin v. Boyle Nat. Bank*, 24 Ky. L. 535.

principal is not for the indemnification of the surety merely but for the better security of the debt, it is generally held that the surety cannot release it as against the creditor so as to cut off the right thereto of the latter upon default, unless the creditor consents, or the rights of bona fide purchasers without notice of the creditor's rights have intervened.⁵⁶ If, however, the security is given for the personal indemnity of the surety merely, rather than for the general security of the debt or as a fund for its payment, the surety may release it and such release, if given in good faith, will be valid as against the creditor unless, at the time of such release, the parties personally liable for the debt were insolvent. Unless this is the case the creditor must take the securities as he finds them when the debt matures.⁵⁷

§ 183. Release of Surety as Affecting Creditor's Right of Subrogation to Debtor's Securities Held by Surety. Where the surety holds security from the principal debtor as indemnity against his suretyship, rather than for the general security of the debt, whatever terminates the liability of the surety has been held to terminate the right of the creditor to be subrogated to such security. Thus, where the surety received from the creditor a release under seal, the creditor was not entitled to be subrogated to a mortgage held by the surety from the principal for his personal indemnity. Such mortgage was held extinguished with the liability against which it was given which was the liability of the surety for the debt.⁵⁸

56. *Taylor v. Farmers Bank*, 87 Ky. 398; *McRady v. Thomas*, 16 Lea (Tenn.) 173; *Carpenter v. Bowen*, 42 Miss. 28; *Seibert v. Thompson*, 8 Kan. 65. See also cases cited in the next note below.

57. *Jones v. Quinnipiac Bank*, 29 Conn. 25; *Thrall v. Spencer*, 16 Conn. 139; *Rankin v. Risley*, 17 Ia. 464; *Logan v. Mitchell*, 67 Mo. 524; See also *Homer v. Bank*, 7 Conn. 478; *Campbell Printing Press Co. v. Powell*, 78 Tex. 53; *Osborne v. Noble*, 46 Miss. 449; *Pool v. Doster*, 59 Miss. 258.

58. *Sumner v. Bachelder*, 30 Me. 35; *Valentine v. Wheeler*, 122 Mass. 566, 23 Am. Rep. 404; *Higgins v. Wright*, 43 Barb. (N. Y.) 461. But where the security was assigned by the surety to the creditor as the consideration for his release, or in payment of the debt,

Though it has been held that a parol release given the surety by the creditor would not destroy the creditor's right of subrogation⁵⁹ a release under seal would have that effect, and so of any other effective mode of release, as where the creditor varied the contract with the principal without the surety's consent,⁶⁰ or the surety was released by failure of the creditor to use due diligence.⁶¹ If the surety is discharged by reason of the statute of limitations, however, the creditor's right of subrogation has been held not to be destroyed.⁶²

It follows from the general rule just stated that if a surety for part only of a debt discharges that part, the creditor has no claim upon securities given for the surety's indemnity.⁶³

it was held that the security was not discharged. *Bank v. Douglass*, 4 Watts. (Pa.) 95, 28 Am. D. 689; *Phillips v. Thompson*, 2 Johns Ch. (N. Y.) 418, 7 Am. D. 535; *Carlisle v. Wilkins*, 51 Ala. 371; *Sheldon on Subrogation*, (2nd Ed.) sec. 159.

59. *Hayden v. Smith*, 12 Met. (Mass.) 511.

60. *Schmetz v. Rix*, 95 Va. 509; *City of Albany v. Andrews*, 29 N. Y. App. Div. 20.

61. *Tilford v. James*, 7 B. Mon. (Ky.) 336; *Virginia Bank v. Boisseau*, 12 Leigh (Va.) 387. See *Phillips v. Thompson*, 3 Johns, Ch. (N. Y.) 418, 7 Am. D. 535.

62. *Forrest v. Luddington*, 68 Ala. 1, 12; *Holt v. Savings Bank*, 62 N. H. 551; *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Ijames v. Gathier*, 93 N. Car. 358; See *Plant v. Storey*, 131 Ind. 46, 49.

63. *Sherrod v. Dixon*, 120 N. Car. 60; *Van Orden v. Durham*, 35 Cal. 126.

CHAPTER XVII.

WHEN DEMAND UPON PRINCIPAL AND NOTICE OF HIS DEFAULT NECESSARY TO CHARGE SURETY OR GUARANTOR.

§ 184. **Surety or Absolute Guarantor not Entitled to Demand or Notice of Default—Majority View.** A technical surety, i. e., one who is bound with the principal by the same contract for the same debt, is not released, ordinarily, by the creditor's failure to make demand upon the principal or to give notice of the latter's default,¹ unless he (the surety) has specially stipulated for such demand or notice, or both.² The reason of this rule is that the surety, being liable with his principal and upon the same undertaking, is bound to know whether or not the obligation which binds both has been performed.

Furthermore, by the great weight of authority, the guarantor of the performance of a definite existing obligation, due at specified future time, is not released by want of demand upon his principal or notice of the latter's default, unless demand and notice are specially stipulated for in the contract, for his promise is absolute, and he is in default the moment the principal is in default by the very terms of his undertaking.³

1. 1 Brandt Sur. & Guar. (3rd Ed.) sec. 2, note 14; Orme v. Young, 1 Holt. N. P. 84, 3 E. C. L. 43; Read v. Cutts, 7 Greenl. (Me.) 186, 20 Am. D. 184; Hunt v. Bridgman, 2 Pick. (Mass.) 581, 13 Am. D. 458; Buckley v. Fitch, 37 Conn. 71; Fitch v. Citizens Nat. Bank, 97 Ind. 211; McMillan v. Bull's Head Bank, 32 Ind. 11, 2 Am. R. 323.

2. See Nat. Sur. Co. v. Long, 125 Fed. 887, 60 C. C. A. 623; and Post, sec. 187 as to special stipulations as to notice. The rules as to dishonest and defaulting officers, agents or employees are somewhat special, and are therefore separately discussed. See Post secs. 207, 208.

3. Brookbank v. Taylor, Cro. Jac. 685; Walton v. Mascall, 13 M. & W. 72, 452; (Compare Warrington v. Furber, 8 East. 242); Holbrow v. Wilkins, 1 B. & C. 10; Hitchcock v. Humphrey, 5 M. & G. 559; Lee v. Dick, 10 Pet. (U. S.) 482, 496; Donley v. Camp, 22

§ 185. Authorities Requiring Reasonable Notice—Minority View—Rule as to Future Advances. A number of authorities, however, hold that reasonable notice of

Ala. 659, 58 Am. D. 274; Killian v. Ashley, 24 Ark. 511, 91 Am. D. 519; First Bank v. Babcock, 94 Cal. 96, 28 Am. St. R. 94; Williams v. Granger, 4 Day (Conn.) 444; Tyler v. Waddingham, 58 Conn. 375, 8 L. R. A. 657; Clark v. Merriam, 25 Conn. 576; City Bank v. Hopson, 53 Conn. 453; (Compare Sage v. Wilcox, 6 Conn. 81; Wright v. Shorter, 56 Ga. 72; Gammel v. Parramore, 58 Ga. 54; Gage v. Mechanic's Bank, 79 Ill. 62; Taussig v. Reid, 145 Ill. 488, 491-492, 36 Am. St. R. 504; Voltz v. Harris, 40 Ill. 155; Metzger v. Hubbard, 153 Ind. 189, 192 and cases cited; Ward v. Wilson, 100 Ind. 52, 50 Am. R. 763; Nading v. McGregor, 121 Ind. 465, 6 L. R. A. 686; Shearer v. Peale, 9 Ind. App. 282 (compare Virden v. Ellsworth, 15 Ind. 144; Gaff v. Sims, 45 Ind. 262); Levi v. Mendell, 1 Duv. (Ky.) 77; Gasquet v. Thorn, 14 La. 506; Heyman v. Dooley, 77 Md. 162, 20 L. R. A. 257; Cobb v. Little, 2 Me. 261, 11 Am. D. 72; Lent v. Padelford, 10 Mass. 230, 6 Am. D. 119; Welch v. Walsh, 177 Mass. 555, 83 Am. St. R. 302; Roberts v. Hawkins, 70 Mich. 566; Hungerford v. O'Brien, 37 Minn. 306; Thresher v. Ely, 10 Miss. 139; Tatum v. Bonner, 27 Miss. 760; Baker v. Kelly, 41 Miss. 696, 93 Am. D. 274-n; Wright v. Dyer, 48 Mo. 525; Barker v. Scudder, 56 Mo. 272; Burrus v. Davis, 67 Mo. App. 210; Flentham v. Steward, 45 Neb. 640; Huff v. Slife, 25 Neb. 448, 13 Am. St. R. 497; Bank of Newbury v. Sinclair, 60 N. H. 59, 49 Am. D. 305, 309; Brown v. Curtis, 2 Comst. (N. Y.) 225; Douglass v. Howland, 24 Wend. (N. Y.) 35; Allen v. Rightmere, 20 Johns (N. Y.) 366; Van Rennselaer v. Miller, Hill & D. (N. Y.) 237; Cordier v. Thompson, 8 Daly, (N. Y.) 172; Weiler v. Henarie, 15 Oreg. 28; Clay v. Edgerton, 19 Oh. St. 549, 2 Am. R. 422; Campbell v. Baker, 46 Pa. 243; Bank v. Hammond, 1 Rich. (S. Car.) 281; Carroll Co. Sav. Bank v. Strother, 28 S. Car. 504; Hunter v. Dickinson, 10 Humph. (Tenn.) 37, with which compare Rhodes v. Morgan, 1 Baxt. (Tenn.) 360; Woodstock Bank v. Downer, 27 Vt. 482, 65 Am. D. 210; Sentinel Co. v. Smith, 143 Wis. 377. The same rule extends to a guaranty of payment on a certain day to which the time of payment of the principal debt is extended. Read v. Cutts, 7 Me. 186, 22 Am. D. 184; Breed v. Hillhouse, 7 Conn. 523, and to the guarantee of payment of an overdue note. Lane v. Levillian, 4 Ark. 76, 37 Am. D. 769; Munro v. Hill, 25 S. Car. 476; and so of a chattel note, Mallory v. Lyman, 3 Pin. (Wis.) 443, or an absolute guarantee of the delivery of chattels under a contract of sale. Heyman v. Dooley, supra, and see generally the note to this last case in 20 L. R. A. 257 and the note to Pearsell Mfg. Co. v. Jeffreys in 64 Am. St. R. 517. Where the guarantor guaranteed, "unconditionally at all times," any advances to the principal, demand and notice of default were held waived. Davis v. Wells, 104 U. S. 159; Mallory v. Lyman, 3 Pin. (Wis.) 443. So where the guaranty was of full, faithful and complete performance. Hubbard v. Haley, 96 Wis. 578.

the principal's default is necessary even where the guaranty is of the sort just described, at least where it is of commercial paper, and the guarantor is discharged by want of it to the extent that he has been injured, as where the principal was solvent when the obligation matured but became insolvent afterward but before notice to the guarantor;⁴ and in a few jurisdictions reasonable notice of default under an absolute guaranty seems necessary, even though the guarantor is not injured by the want of it.⁵

Where, under a guaranty of payment or performance, however, there is uncertainty as to the amount that may be due, or the time when it will become due it is held in practically all jurisdictions that the guarantor is discharged to the extent of any loss he may actually suffer by reason of the creditor's failure to give him notice of the amount due from the principal within a reasonable time after the contract has been terminated or the transactions with him have been closed.⁶ Under this rule,

4. 2 Kent's Com. 28, 3 Kent's Com. 122; *Hitchcock v. Humphrey*, 5 Man. & Gr. 559, 44 E. C. L. 296; *Phillips v. Astling*, 2 Taunt. 206. (Compare *Walton v. Mascal*, 13 M. & W. 542.) *Davis v. Wells*, 104 U. S. 159; *Lewis v. Brewster*, 2 McL. 21; *Footte v. Brown*, 2 McL. 369; *Pierce v. Kennedy*, 5 Cal. 138; *Fuller v. Scott*, 8 Kan. 25; *Erwin v. Lamborn*, 1 Harr. (Del.) 125; *Withers v. Berry*, 25 Kan. 373; *Gammage v. Hutchins*, 23 Me. 565, (semble); *Bank v. Small*, 25 Me. 366; *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. R. 302; *Oxford Bank v. Haynes*, 8 Pick. (Mass.) 423, 19 Am. D. 334; *Talbot v. Gay*, 18 Pick. 534; *Whiton v. Mears*, 11 Met. (Mass.) 563, 45 Am. D. 233; *Vinal v. Richardson*, 13 Allen (Mass.) 521, 530; *Lemmert v. Guthrie Bros.*, 69 Neb. 499, 111 Am. St. R. 561, 62 L. R. A. 954; *Grice v. Ricks*, 3 Dev. (N. C.) 62; *Farrow v. Respess*, 11 Ired. (N. C.) 170; *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. D. 280; *Kannon v. Neeley*, 10 Humph. (Tenn.) 288 (sealed note); *Benson v. Gibson*, 1 Hill L. 56 (past due note); *Sanford v. Norton*, 14 Vt. 228.

5. *Riggold v. Newkirk*, 3 Ark. 96. See also, *Vinal v. Richardson*, supra; *Reynolds v. Edney*, 53 N. Car. 406. Most of the cases requiring notice of default under a guaranty absolute in terms involve commercial paper and proceed on the idea that there is some analogy between the obligation of the guarantor of such paper and that of a technical indorser. *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. R. 302, confining the rule to such paper.

6. *Reynolds v. Douglas*, 12 Pet. (U. S.) 497, (qualifying s. c., 7 Pet. 113); *Wildes v. Savage*, 1 Story (U. S.) 22, 34, 35; *Cremer*

however, it is enough that notice of the amount due at the close of the transactions under the guaranty be given; and each separate credit given the principal need not be notified to the guarantor;⁷ and in no case it seems is the guarantor released by want of notice of default and the amount due under the guaranty unless he is actually injured by the want of it, and if the principal was wholly insolvent when the debt became due and remains so, demand upon the principal and notice to the guarantor are excused, unless the guarantor is prepared to prove injury notwithstanding such insolvency.⁸

§ 186. Time and Sufficiency of Notice of Principal's Default—Pleading. Where notice of the principal's default is necessary to fix the liability of a guarantor,

v. Higginson, 1 Mason (U. S.) 323; Dunbar v. Brown, 4 McLean (U. S.) 166; Walker v. Forbes, 25 Ala. 139, 60 Am. D. 498; Cahuzac v. Samini, 29 Ala. 288; McCollum v. Cushing, 22 Ark. 540; Maybury v. Bainton, 2 Harr. (Del.) 24; Taussig v. Reid, 145 Ill. 488, 36 Am. St. R. 504; Mamerow v. Nat. Lead. Co., 206 Ill. 626, 99 Am. St. R. 196; Smith v. Bainbridge, 6 Blackf. (Ind.) 12; Furst Co. v. Bradley, 111 Ind. 308; Ward v. Wilson, *supra*; Milroy v. Quinn, 69 Ind. 406, 35 Am. R. 227; (but see Kirby v. Studebaker, 15 Ind. 45); Davis Co. v. Mills, 55 Iowa 543; Singer Mfg. Co. v. Littler, 56 Ia. 601; Howe v. Nickels, 22 Me. 175; Welch v. Walsh, 177 Mass. 555, 83 Am. St. R. 302; Clark v. Remington, 11 Met. (Mass.) 361; Vinal v. Richardson, 13 Allen (Mass.) 15; Mussey v. Rayner, 22 Pick. (Mass.) 228; Babcock v. Bryant, 12 Pick. (Mass.) 133; Courtis v. Dennis, 7 Met. (Mass.) 510; Montgomery v. Kellogg, 43 Miss. 486, 5 Am. R. 508; Brackett v. Rich, 23 Minn. 485, 23 Am. R. 703 (guaranty of collection). See Wildes v. Savage, 1 Story (U. S.) 22; Davis v. Wells, 104 U. S. 159.

7. Cahuzac v. Samini, *supra*; Lowe v. Beckwith, 14 B. Monr. (Ky.) 150; Reynolds v. Douglas, 7 Pet. (U. S.) 113. Under guarantees of collection, as we have seen, notice of failure of the creditor to collect by the exercise of due diligence is all that is required. *Ante*, sec. 110.

8. Warrington v. Furber, 8 East. 242; Van Wirt v. Wilkins, 3 B. & C. 439, 447; Wildes v. Savage, 2 Story (U. S.) 22; Montgomery v. Kellogg, 43 Miss. 486, 5 Am. R. 508; Bishop v. Eaton, 161 Mass. 496, 42 Am. St. R. 437; German Am. Sav. Bank v. Drake Roofing Co., 112 Ia. 184, 84 Am. St. R. 335; Mamerow v. Nat. Lead Co., 206 Ill. 626, 99 Am. St. R. 196; Gibbs v. Cannon, 9 Sarg. & R. (Pa.) 198, 11 Am. D. 699; Newton Wagon Co. v. Diers, 10 Neb. 284. Compare Reynolds v. Edney, 53 N. Car. 406.

notice must be given within a reasonable time after such default occurs. What is a reasonable time, however, cannot, in the nature of things, be the subject of any fixed or definite rule, and each case must depend upon its own peculiar facts and circumstances, and is not to be tested by the strict rules of the law merchant applicable to indorsers of commercial paper,⁹ and no delay, however long, in giving the notice will release the guarantor, unless it is shown that he sustained injury on that account, for the very object of the notice is to enable him to protect himself against the principal. Hence, where there has been no intervening change in the circumstances of the principal the guarantor is *prima facie* liable, notwithstanding the want of notice.¹⁰

The notice need not be in any particular form, unless the contract of the guarantor so provides, and actual knowledge from an independent source will dispense with the necessity for direct notice from the guarantor.¹¹

Generally, however, as we have seen, a guarantor is not released by lack of notice of default unless he is actually injured thereby, and want of notice, and resultant

9. *Dunbar v. Brown*, 4 McLean (U. S.) 166; *Wilds v. Savage*, 1 Story (U. S.) 22; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. R. 508; *Wells v. Davis*, 2 Utah 414; *Craft v. Isham*, 13 Conn. 28; *Lowry v. Adams*, 22 Vt. 160. See also, *Babcock v. Bryant*, 12 Pick. (Mass.) 133.

10. *Wilds v. Savage*, *supra*; *Paige v. Parker*, 8 Gray (Mass.) 211; *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 184, 58 Am. D. 659; *Montgomery v. Kellogg*, *supra*; *March v. Putney*, 56 N. H. 34; *Salem Mfg. Co. v. Brower*, 49 N. Car. 429; *German Am. Sav. Bank v. Drake Roofing Co.*, 112 Ia. 184, 84 Am. St. R. 335, 51 L. R. A. 758. See also, cases cited, *infra*, note 12.

11. *Bickford v. Gibbs*, 8 Cush. (Mass.) 154; *Mamerow v. Nat. Lead Co.*, 206 Ill. 626, 99 Am. St. R. 197; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. R. 508. Knowledge or notice may be inferred or the guarantor may be deemed legally chargeable therewith from the relations or situation of the parties and the circumstances of the case, and where the directors of a corporation were also its guarantors, they were held chargeable with notice of its indebtedness and default. *Mamerow v. Nat. Lead Co.*, *supra*.

injury are defensive matter to be pleaded and proved.¹² In this respect it differs from the demand and notice required to charge the drawers or indorsers of commercial paper. In actions against them demand and notice or the facts dispensing with them should be pleaded and proved, though a general averment of due presentment, demand and notice is usually deemed sufficient.¹³

Like the notice due drawers and indorsers, however, notice to the guarantor may be waived even after he is released by want of it, by any words or conduct on his part, with knowledge of the facts, which show his intention to treat the guaranty as a subsisting obligation.¹⁴

§ 187. Express Stipulations for Notice and Proofs of Default—Fidelity and Guaranty Bonds. We have already seen that the fidelity and other non-judicial bonds of corporate sureties issued in the regular course of their business, are in the nature of insurance policies to the extent, at least, that they are construed strictly against the company and in favor of the obligee;¹⁵ and it has been recently held that a provision in a surety bond requiring notice of default to the surety is one to be performed after the occurrence of the loss or damage for which recovery is sought, and while a condition precedent to the maintenance of an action, pertains to the remedy, and is not essential to the binding force of the

12. *Davis v. Wells*, 104 U. S. 159; *Sentinel Co. v. Smith*, 143 Wis. 377 and cases cited; *Ward v. Wilson*, 100 Ind. 52, 50 Am. R. 763; *La Rose v. Logansport Bank*, 102 Ind. 332; *Simons v. Steele*, 36 N. H. 73; *Mamerow v. Nat. Lead Co.*, 206 Ill. 626, 99 Am. St. R. 196, and cases cited. While a general averment of due notice has been held sufficient, at least after verdict, it has also been held that the notice must be particularly set forth that the court may judge of its sufficiency. *Rapelye v. Bailey*, 3 Conn. 438, 8 Am. D. 199. Compare as to notice of acceptance, ante, sec. 42.

13. See 2 *Daniel Neg. Inst.*, sec. 1047 et seq.

14. *Breed v. Hillhouse*, 7 Conn. 523; *Curran v. Colbert*, 3 Ga. 239, 46 Am. D. 427; *Trotter v. Strong*, 63 Ill. 272; *Wren v. Peel*, 64 Tex. 374. See also, *Lemmert v. Guthrie Bros.*, 69 Neb. 499, 111 Am. St. R. 651, 62 L. R. A. 954.

15. *Ante*, sec. 93.

contract prior to default, and like similar provisions on ordinary policies of insurance is not as strictly construed as the conditions involving the essence of the agreement. Pursuant to this principle it was further held that where the bond of the surety company for the performance of a contract to build a bridge, provides "that, in the event of any default on the part of the principal in the performance of any of the terms or conditions of said contract, written notice thereof, with a verified statement of the facts showing such default and the date thereof, shall, within ten days after such default, be mailed to said surety at its office in the city of Chicago," the obligee was not bound to discover a secret fraudulent substitution by the principal of lighter material than that specified, and that such notice was due only when the obligee was appraised of the default or should have known thereof in the exercise of reasonable diligence.¹⁶ So, a stipulation in a fidelity bond for notice of certain facts "coming to the knowledge of the employer" calls for actual knowledge and not merely constructive notice to him, and knowledge of facts which a critical examination of the employee's books might have disclosed is not to be imputed to the beneficiary.¹⁷ Neither is the employer bound, in the absence of express terms in the contract, to communicate to the company mere suspicions of the dishonesty or other misconduct of the risk, notice of which is required by the contract.¹⁸

16. *Van Buren County v. Am. Surety Co.*, 137 Ia. 490, 126 Am. St. R. 290.

17. *First Nat. Bank v. U. S. Fid. & Guar. Co.*, 150 Wis. 601, 609; *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634, 33 L. R. A. 821.

18. *Am. Surety Co. v. Pauly*, 170 U. S. 133; *Pacific Fire Ins. Co. v. Pac. Sur. Co.*, 93 Cal. 7; *Gamble-Robinson Co. v. Mass. Bonding & Ins. Co.*, 113 Minn. 38. Neither is the beneficiary bound in the absence of express agreement to communicate loose conduct on the part of the risk unconnected with his employment, as where the risk, while intoxicated, was robbed of his own money. *Long Bros. Grocery Co. v. U. S. Fid. Co.*, 130 Mo. App. 431. As to express stipulations touching supervision of the risk, see *Post*, sec. 208.

Pursuant to principles of construction already laid down and familiar in other departments of insurance, a provision in a fidelity bond for "immediate notice" to the insurer or notice to it "forthwith," or "as soon as possible," of any loss or default under the bond, or of any other fact specified therein, is commonly construed to mean, as in other policies of insurance, such prompt notice as the circumstances of the case reasonably admit of and require.¹⁹

The giving of notice or the making of proofs of loss, however, when made a condition of the bond is a condition precedent to the right of recovery, and it is no excuse for the failure to give it that the employer deemed the facts immaterial or that the company was not actually damaged by the omission, and compliance with such condition must be alleged and proved as part of the plaintiff's cause of action.²⁰

Where the bond is for the protection of third per-

19. *Am. Surety Co. v. Pauly*, 170 U. S. 133; *Fidelity & Dep. Co. v. Courtney*, 186 U. S. 342; *Bank v. Tarboro v. Fidelity & Dep. Co.*, 128 N. Car. 366, 83 Am. St. R. 682; *Gamble-Robinson Co. v. Mass. Bonding & Ins. Co.*, 113 Minn. 38. What is a reasonable time is ordinarily for the jury. *Remington v. Fid. & Dep. Co.*, 27 Wash. 429, citing 2 May, Ins. (4th Ed.) sec. 462; 4 Joyce, Ins., sec. 3292; *Lachsin, etc. v. London, etc. Co.*, 3 Dom. L. Rep. 335. Where the facts are undisputed and only one inference can reasonably be drawn from them the question of reasonable time is for the court; otherwise for the jury. *Hormel v. Am. Bonding Co.*, 33 L. R. A. (N. S.) 513.

20. See *Guarantee Co. v. Mechanics Sav. Bank & Trust Co.*, 183 U. S. 402; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 27 L. R. A. (N. S.) 573, citing many authorities. Compare as to pleading and proof, *United Am. Fire Ins. Co. v. Am. Bonding Co.*, 146 Wis. 573, 40 L. R. A. (N. S.) 661, holding that failure to give notice is defensive, to be pleaded and proved by the company. See *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, holding that failure to notify the company of subsequent defaults is a waiver of indemnity as to those only, and not as to such prior defaults as were properly notified to the company. See also, *Herffernan v. U. S. Fid. & Guar. Co.*, 37 Wash. 477.

sons, laborers and materialmen, they have been held bound by the condition as to notice.²¹

§ 188. Same—Proofs of Loss—Waiver and Estoppel. It is frequently a condition of fidelity, contract, and other corporate surety bonds, that the obligee shall, upon demand of the insurer, or within a specified time, furnish particulars and proofs of his claim and the correctness thereof. While compliance with such conditions is a condition precedent to the right to recover unless waived,²² the proofs themselves are liberally construed in favor of the beneficiary, and will ordinarily be held sufficient where they state or omit nothing whereby the surety is misled to his prejudice and are fairly responsive to the calls of the policy and the demands of the company made under it.²³

Such conditions, as well as the provision as to notice, may of course be waived, and if the company proceeds to adjust the loss without requiring proofs of loss, or knowing that none have been made, it cannot afterward take advantage of the want of them,²⁴ and where the company expressly denies all liability, or denies it upon some other ground than want of notice and proofs of loss, it will be held to have waived them;²⁵ and where the com-

21. *Knight & Jillson Co. v. Castle*, *supra*. See also, *Ante*, secs. 115, 116.

22. *Fid. & Cas. Co. v. Gate City Nat. Bank*, 97 Ga. 634, 33 L. R. A. 821; *Hough v. Am. Surety Co.*, 90 Mo. App. 475; *Sloman v. Merc. Cr. Guar. Co.*, 112 Mich. 258; *Weidner v. Union Sur. Co.*, 86 N. Y. Supp. 105, 42 Misc. 499.

23. *Am. Surety Co. v. Pauley*, 72 Fed. 470, 482; *Am. Surety Co. v. Pauley*, 170 U. S. 160. See *Frost Guar. Ins.* (2nd Ed.), pp. 375, 376.

24. See *Globe Sav. & Loan Co. v. Employers, etc. Co.*, 37 Can. L. J. 511. While this is true as to such technical defenses as want of notice and proofs of loss, it has been held that the company does not waive or become estopped to set up fraud on the part of the obligee at the inception of the bond, by sending an agent to examine the accounts of the risk and taking steps to arrest the defaulter, where the obligee was in no wise prejudiced by these acts of the company. *National Bank v. Fid. & Cas. Co.*, 89 Fed. 819.

25. See *Sinclair v. Nat. Sur. Co.*, 132 Ia. 549.

pany retains proofs submitted without objection until it is too late to make further proofs within the terms of the policy, any objection to the proofs submitted has been held waived.²⁶ So though the policy provides for written notice, if the company accepts and acts upon verbal notice, written notice will be waived.²⁷ Indeed the principles here are practically the same as in other departments of insurance law and any further discussion of this matter would lead beyond the legitimate scope of a work on suretyship and guaranty.

§ 189. Same—Does Waiver by Surety Company Affect its Right to Claim Indemnity From the Risk? The company, as has just been seen, may, as against the obligee or insured, waive the stipulations or conditions of its bond or policy as to notice or proofs of loss. Does such waiver, however, prevent the insurer from recovering against the risk on the ground that the obligation of the risk to indemnify the company upon a bond given at his request is co-extensive with the obligation of the company to indemnify the insured? It has been so held.²⁸ Though it may be urged that the company in paying under these circumstances is a mere volunteer, and conceding that it probably would be if no claim whatever had been made upon it by the obligee, it would seem that the provisions in question are for the protection of the company rather than the risk, and are such as are frequently if not customarily waived by the company.²⁹

26. *Sinclair v. Nat. Sur. Co.*, *supra*, and cases cited at page 560 of the opinion. See also, *Am. Credit Indemnity Co. v. Carrolton Furniture Co.*, 95 Fed. 111, 36 C. C. A. 671.

27. See *Goldman v. Fid. & Dep. Co.*, 125 Wis. 390. So where it takes steps to adjust the loss without requiring formal notice thereof. *Perpetual Bldg. & Loan Assn. v. U. S. Fid. & Guar. Co.*, 118 Ia. 729; *Gray v. Blum*, 55 N. J. Eq. 553.

28. *Fid. & Cas. Co. v. Eickhoff*, 63 Minn. 170, 180, 56 Am. St. R. 464.

29. See *Frost Guar. Ins.* (2nd Ed.), sec. 295.

CHAPTER XVIII.

PAYMENT, SATISFACTION AND TENDER BY PRINCIPAL AS DISCHARGE OF SURETY. DUTY OF CREDITOR TO AP- PLY PRINCIPAL'S FUNDS OR PROPERTY. SET-OFF AND COUNTERCLAIM.

§ 190. **Payment or Satisfaction—In General.** Absolute payment by the principal of the whole of the debt secured will of course discharge the surety, and this is so in spite of any agreement between the principal and creditor to which the surety is not a party;¹ and so of what, as between principal and creditor, amounts to a complete accord and satisfaction.²

Whether the imprisonment of the principal operates as payment or satisfaction of a debt so as to discharge the surety is not altogether clear. The imprisonment of the principal under a *capias ad satisfaciendum* had that effect at common law.³ Though a fine imposed for violation of a city ordinance is in the nature of a debt, im-

1. *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88; *Coots v. Farnsworth*, 61 Mich. 497; *Lackey v. Steere*, 121 Ill. 598, 2 Am. St. R. 135; *State v. Mellette*, 21 S. Dak. 404. The mere acceptance by the creditor of part of the debt will not release the surety unless the transaction amounts to an accord and satisfaction, though it will of course be a part payment as to the sureties as well as the principal. But where the principal delivered property to the creditor in extinguishment of the debt the surety was held discharged, though the creditor subsequently permitted the principal to apply part of the property to his own use. *Ruble v. Norman*, 7 Bush. (Ky.) 582. See also, *Heist v. Tobias*, 132 Pa. St. 442; *Cason v. Heath*, 86 Ga. 438.

2. *Morris Canal Co. v. Van Vorst*, 1 Zab. (N. J.) 100; *Pettyjohn v. Liebscher*, 92 Ga. 149; *State v. Mellette*, *supra*.

3. *Koenig v. Steckel*, 58 N. Y. 475. It is well settled that a levy of execution on personal property is satisfaction to the extent of the value of the property or interest taken and a valid levy on the principal's property therefore discharges the surety *pro tanto*. *Brown v. Kidd*, 34 Miss. 291; *Post*, sec. 250 and cases cited to the rule that release or abandonment of the levy releases the non-consenting surety where it constitutes the relinquishment of a lien created by such levy.

prisonment of the principal in lieu of payment has been held not to discharge a surety on his appeal bond as the imprisonment was simply a means of coercing payment and hence beneficial to the surety.⁴ It is not our purpose to discuss generally what constitutes payment of a debt. It has been held, however, that where the creditor innocently receives payment from the principal debtor which he is afterward compelled to relinquish because it constitutes an illegal preference, he may still recover from the surety,⁵ and so where the payment by the principal is for some other reason unavailing.⁶

§ 191. **Application of Payments.** While it is not our purpose here, as has just been said, to consider generally what constitutes payment of a debt it seems necessary to consider the question whether, there being debts owing from the principal to the creditor other than that for which the surety is bound, the surety may insist that a given payment be applied to his exoneration. It appears to be well settled:

(1) That where a person owes several debts to the same creditor, he has an absolute right at the time it is made to apply a payment to any one of them though there is a surety for the other or others,⁷ and in determining whether there has been such an application by

4. *Sheffield v. O'Day*, 7 Ill. App. 339.

5. *Petty v. Cooke*, L. R. 6 Q. B. 794; *Swartz v. First Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387; *Northern Bank v. Farmer's Bank*, 111 Ky. 350. And this has been held even where the creditor knew that the payment constituted a fraudulent preference. *Watson v. Poague*, 42 Ia. 582; *Harner v. Batdorf*, 35 Oh. St. 113. Contra, *Northern Bank v. Cooke*, 13 Bush. (Ky.) 340. See also, 1 Bush. (Ky.) 412.

6. *Hier v. Harpster*, 76 Kan. 1; *Corydon Deposit Bank v. McClure*, 140 Ky. 149; *Benson Bank v. Jones*, 147 N. Car. 419, 16 L. R. A. (N. S.) 343.

7. *Stone v. Seymour*, 15 Wend. (N. Y.) 20, and authorities cited; *Harding v. Tift*, 75 N. Y. 461; *Wetherell v. Joy*, 40 Me. 325; *Allen v. Jones*, 8 Minn. 202; *Dr. Blair Med. Co. v. U. S. Fid. & Guar. Co.*, (Ia., 1902), 89 N. W. 20. This has been held though the application was in part to the payment of usurious interest. *Allen v. Jones*, 8 Minn. 202.

the debtor, the court will consider all the facts and circumstances of the case.⁸

(2) That if there has been no application by the debtor at the time of payment or before an application thereof has been made by the creditor, the latter may apply the payment as he sees fit, provided the debt to which he applies it is legal, undisputed and presently due, and it makes no difference that there is a surety for some other debt of the same kind owing from the same debtor.⁹

(3) That if neither party has made an application of the payment as among several debts due between them, the law will apply the payment as the justice and equity of the particular case may demand.¹⁰ Precisely what application is to be deemed most just and equitable is the subject of much confusion and conflict in the cases. Generally, however, the courts deem it most consonant with justice and equity to apply a general payment to interest before principal, to an older in preference to later debt, to a debt due rather than one not due, and to an unsecured debt, or one for which the security is inadequate or precarious, in preference to a secured one or for which the security is adequate.¹¹ Pursuant to this last principle a general payment will not ordinarily be applied in exoneration or discharge of a surety, as against a debt that is unsecured, at least in the absence of some equity in favor of the surety beyond the mere fact of surety-

8. *Stone v. Seymour*, supra, and cases cited.

9. *Williams v. Rawlinson*, 10 Moo. 362, 3 Bing. 71; *Kirby v. Marlborough*, 2 M. & S. 18; *Blanton v. Rice*, 5 Monr. (Ky.) 253; *Allen v. Culver*, 3 Denio (N. Y.) 284; *Stone v. Seymour*, 15 Wend. (N. Y.) 20, and authorities cited; *Harding v. Tift*, 75 N. Y. 461; *Pelzer, Rogers & Co. v. Steadman*, 22 S. Car. 279; *Mathews v. Switzler*, 46 Mo. 301; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Cain v. Vogt*, 138 Ia. 631, 128 Am. St. R. 216. See also, *Lowe v. Reddan*, 123 Wis. 90.

10. *Story's Eq. Jur.* (13th Ed.), secs. 459a, 459b, *Blanton v. Rice*, supra; *Allen v. Culver*, supra.

11. See *Clayton's Case*, 1 Meriv. 585; *Pemberton v. Pakes*, 4 Russ. 154, 168; *Smith v. Lloyd*, 11 Leigh (Va.) 512, 37 Am. D. 621, and note; *Crompton v. Pratt*, 105 Mass. 255; *Allen v. Culver*, 3 Denio (N. Y.) 284.

ship.¹² Doubtless, however, if the debtor had raised the money paid the creditor, by the aid or upon the credit of the surety, for the purpose of paying the debt secured, this would give the surety a plain equity to have it applied upon the debt for which he was liable, though the principal or creditor, or both, made a different application of it, provided the creditor received it with knowledge of the facts.¹³

§ 192. Tender by Principal as Discharge of Surety. Tender by the principal of payment or performance according to the terms of his contract discharges the surety, though the creditor refuses to receive it. It is hardly necessary to give reasons in support of this rule. The contract of suretyship imports entire good faith. Furthermore it is suggested that the transaction amounts as against the surety to a payment of the debt and a new loan to the principal, and finally, though the debtor cannot compel the creditor to receive payment or performance, his refusal to do so, where the offer to pay or perform is strictly in accordance with the undertaking of the principal, is a fraud upon the surety and an unjust and

12. *Cain v. Vogt*, 138 Ia. 631, 635, 128 Am. St. R. 216, citing other Iowa cases and *Harding v. Tift*, 75 N. Y. 461, 465, and cases cited; *Hall v. Johnston*, 6 Tex. Civ. App. 110, 24 S. W. 861; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Wilhelm v. Schmidt*, 84 Ill. 183. See to the same effect, *Burks v. Albert*, 4 J. J. Marsh. (Ky.) 97, 20 Am. D. 209. In Pennsylvania and Tennessee it is held that the application will be made upon the oldest debt though such application will discharge a surety. *Pittsburg v. Rhodes*, 230 Pa. St. 397; *Pardee v. Markle*, 111 Pa. St. 555, 56 Am. R. 299; *Blackmore v. Granberry*, 98 Tenn. 277. See also, *Kinnaird v. Webster*, 10 Ch. Div. 139. See as to the civil law rule which requires the application to be made to the exoneration of the surety, *Blackmore v. Granberry*, 98 Tenn. 277; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 23; *Marryatts v. White*, 2 Stark. 101.

13. See *Harding v. Tift*, *supra*; *Merchants Ins. Co. v. Herber*, 68 Minn. 420; *Olds Wagon Works v. Bank*, 10 Ky. L. 235. Where the creditor proves and receives dividends in bankruptcy for a debt for part of which there is a surety, the dividends must, it seems, be applied pro rata to the secured and unsecured parts alike. *Bardwell v. Lydall*, 7 Bing. 489.

needless increase and prolongation of his risk.¹⁴ Clearly if the surety himself makes a valid tender of the debt secured, he is discharged.¹⁵ It is enough on this subject to add that if the tender is sufficient at the time it is made as between the principal and creditor, it need not be kept good in order to discharge the surety, though it must be kept good in order to stop interest and throw the costs on the creditor in favor of the principal.¹⁶

§ 193. Duty of Creditor to Apply Funds or Property of Principal in His Hands—Bank Deposits. Where, at the maturity of a debt for which a surety is bound, the creditor has in his hands or within his control funds or property of the principal available for the payment of the debt, it is ordinarily his duty to apply them thereon, and his surrender of such funds to the principal, or his negligent loss of such funds or property, will debar him pro tanto of his remedy against the surety, unless such surrender is with the surety's consent.¹⁷ But it has been held that where the principal offers to pay the creditor, but the latter desires the debtor to keep the money a little longer for the accommodation of the creditor, which the principal agrees to do, the surety is not released.

14. 1 Brandt Sur. & Guar. (3rd Ed.), sec. 373; *Hayes v. Josephi*, 26 Cal. 535; *Johnson v. Ivy*, 4 Coldw. (Tenn.) 608, 94 Am. D. 206; *Johnson v. Mills*, 10 Cush. (Mass.) 503; *Fisher v. Stockebrand*, 26 Kan. 565; *Bonner v. Nelson*, 57 Ga. 433. But see *Clark v. Sickler*, 64 N. Y. 231, 21 Am. R. 606, commented on in the next section.

15. *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. R. 155.

16. *Smith v. Loan Association*, 119 N. Car. 257; *Randol v. Tatum*, 98 Cal. 390; *Sears v. Van Dusen*, 25 Mich. 351. Compare *State v. Alden's Securities*, 12 Ohio 59, a case of an official bond. *Clark v. Sickler*, *supra*.

17. *Johnson v. Mills*, 10 Cush. (Mass.) 503; *Everly v. Rice*, 20 Pa. 297; *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. D. 311; *Fegely v. McDonald*, 89 Pa. 128; *Lichtenthaler v. Thompson*, 13 Sarg. & R. (Pa.) 157, 15 Am. D. 581; *Perrine v. Ins. Co.*, 22 Ala. 575; *Cf. Spurgeon v. Smith*, 114 Ind. 453; *Sailly v. Elmore*, 2 Paige (N. Y.) 497. In *Fegely v. McDonald*, *supra*, the surety was held discharged where the creditor delayed unreasonably to present the check of the principal for payment whereby the amount of the debt was lost. See also, *Post*, secs. 245 et seq. as to loss or surrender of securities.

This is upon the principle that the transaction amounts to a mere voluntary forbearance or indulgence on the part of the creditor,¹⁸ which, as we have seen, will not release an absolute guarantor or a technical surety.¹⁹

Where the creditor is a bank and the principal its depositor, the authorities are not agreed as to the duty of the bank to apply a balance of his deposit account to the exoneration of his sureties or indorsers, instead of paying it out upon his checks. By the weight of authority, the bank is under no obligation to so apply it, though it may exercise that privilege if it sees fit, unless the deposit is held for a special purpose. This is so whether the balance arose before or after the maturity of the debt, unless the principal directed the application at the time of making the deposit.²⁰

These rulings are usually placed upon the ground that money deposited in bank in the ordinary way is not mere property of the principal debtor upon which the bank has a lien, but is absolutely its own to do with as it chooses, and if it elects to pay the principal's checks with it, it is its own affair, and the surety has no right to complain.²¹

A considerable number of authorities, however, adopt a different view, and hold that the bank is bound to apply the deposit of the principal to the obligation for which the surety is responsible, if it is sufficient to meet the whole debt, unless it has received the deposit

18. Ante, sec. 3; *Clark v. Sickler*, 64 N. Y. 231, 21 Am. R. 606; *Second Bank v. Poucher*, 56 N. Y. 348. But see *Johnson v. Mills*, supra.

19. See also, Post, sec. 224.

20. *Strong v. Foster*, 17 C. B. 201; *Voss v. German Bank*, 83 Ill. 599, 25 Am. R. 415; *Second Bank v. Hill*, 76 Ind. 223, 40 Am. R. 239; *Martin v. Mechanics' Bank*, 6 Harr. & J. (Md.) 235; *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. R. 368; *Peoples' Bank v. Le Grand*, 103 Pa. 309, 49 Am. R. 126; *First Bank v. Shreiner*, 110 Pa. 188; *Bank v. Peltz*, 176 Pa. 513, 53 Am. St. R. 686, 36 L. R. A. 832; *National Bank of Newberg v. Smith*, 66 N. Y. 271, 23 Am. R. 48-n.

21. *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. R. 368, and cases cited in the opinion and in the last note above.

for a particular purpose. "If the bank," says Mr. Morse,²² "at maturity of the note held by it, holds funds that, by a scratch of the pen, it could apply upon the note, thus securing itself, it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated as security for the purpose of securing the note,"²³ and it is clearly its duty to apply the deposit in relief of the surety where the unappropriated balance to the depositor's credit is large enough to pay the obligation secured, and such obligation is expressly payable at the bank, and if it fails to so apply such balance, the surety or guarantor of such obligation is released.²⁴ In any case, however, release of part of the deposit to the principal would discharge the indorser or surety only to the extent of the amount released.²⁵

§ 194. May Surety Have Benefit of Set-Off or Counterclaim in Favor of His Principal? Whether matter of

22. 2 Morse on Banking (3rd Ed.), sec. 563.

23. McDowell v. Bank, 1 Harr. (Del.) 369; Pursiful v. Pineville Banking Co., 97 Ky. 154, 53 Am. St. R. 409; Bank of Taylorsville v. Hardesty, 28 Ky. L. 1285; Mechanics & Traders Bank v. Seitz Bros., 150 Pa. 632, 30 Am. St. R. 853. See also, White v. Life Assn., 63 Ala. 419, 430, 35 Am. St. R. 45; Dawson v. Real Estate Bank, 5 Ark. 283, 297, 299; Commercial Nat. Bank v. Henninger, 105 Pa. St. 496. In Pennsylvania it seems that there is no duty of the bank to apply the principal's deposit in relief of the surety unless the balance at maturity is sufficient to meet the obligation in full at that time. First National Bank v. Schreiner, 110 Pa. 188; People's Bank v. Legrand, 103 Pa. 309. That it is immaterial that sufficient funds of the principal were not in the bank at maturity, if they were deposited afterward, see McDowell v. Bank, *supra*; Bank of Taylorsville v. Hardesty, *supra*. The bank, however, is under no duty to apply funds held as a special deposit at the maturity of the note, or received for a special purpose afterward. Dawson v. Real Estate Bank, *supra*; Faulkner v. Cumberland Valley Bank, 14 Ky. L. 923; Royse v. Winchester Bank, 148 Ky. 368.

24. Home Bank v. Newton, 8 Ill. App. 563, 565; Commercial Bank v. Henninger, *supra*; German Bank v. Foreman, 138 Pa. 474, 21 Am. St. R. 908; Mechanics' Bank v. Seitz, 150 Pa. 632, 637, 30 Am. St. R. 853; Bank v. Peltz, 176 Pa. 513, 518, 53 Am. St. R. 686, 36 L. R. A. 832; Pursifull v. Pineville Banking Co., 97 Ky. 154, 53 Am. St. R. 409.

25. See Lowe v. Reddan, 123 Wis. 90.

counterclaim in favor of the principal debtor against the creditor can be availed of by the surety when sued by the creditor is a question that has, in some of its phases, occasioned much discussion and some confusion and conflict in the cases.

This much under ordinary statutes appears to be reasonably well settled:

(1) Where the principal and surety are sued together and the principal pleads and proves a counterclaim, whether it be by way of recoupment or strict set-off, the surety is relieved to the extent of such counterclaim.²⁶

(2) Where the surety, though sued alone, pleads and proves a counterclaim in favor of his principal with the consent of, or under an assignment from the latter, he is exonerated to the extent of such counterclaim.²⁷

Where the surety is sued alone, however, and there has been no consent to his use of a counterclaim in favor of the principal, more difficulty arises. If the counterclaim is strictly such that the principal might have an affirmative judgment against the creditor, whether such counterclaim arose out of the transaction in which the surety is bound or not, the right of the surety at law to avail himself of it is generally denied in the absence of an express statutory provision in favor of sureties. This is on the ground that the counterclaim does not go to the existence of the obligation for which the surety is liable, that it is a matter in which the principal has a distinct and independent interest and a right to litigate or refrain from litigating on his own behalf, that in an action against the surety alone, no affirmative judgment can be entered for the principal

26. *Hollister v. Davis*, 54 Pa. 508; *McHardy v. Wadsworth*, 8 Mich. 349; *Waterman v. Clark*, 76 Ill. 428; *Himrod v. Baugh*, 85 Ill. 435; *Mahurin v. Pearson*, 8 N. H. 539. But see *Walker v. Leighton*, 11 Mass. 140; *Banks v. Pike*, 15 Me. 268.

27. *Winston v. Metcalf*, 6 Ala. 756; *Graff v. Kahn*, 18 Ill. App. 485, and authorities cited. See also, *Edmunds v. Harper*, 31 Gratt. (Va.) 637.

in case the claim set off exceeds the debt for which the surety is liable, and that a contrary rule would tend to the splitting of causes of action.²⁸

Under this rule a mere claim for breach of warranty in favor of the principal cannot be availed of by the surety,²⁹ though if the principal has rescinded for such breach the surety may doubtless avail himself of the defense.³⁰ Some of the cases, however, appear to hold the contrary of the foregoing, even at law,³¹ and in equity, the insolvency of the principal will ordinarily be sufficient reason for permitting the surety to avail himself of a set off in favor of the principal and against the creditor.³² Where the counterclaim, however, is in the nature of a mere recoupment or matter in mitigation constituting an entire or partial failure of the consideration of the debt for which the surety is bound, such counterclaim will ordinarily be available to the surety even though he is sued without his principal, and there has been no assignment or consent to the use of the counterclaim by the latter.³³

In a number of cases the surety has been allowed to set off against the creditor an independent demand,

28. *Graff v. Kahn*, 18 Ill. App. 485; *Waterman v. Clark*, 76 Ill. 428; *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171; *B. & O. R. R. Co. v. Bitner*, 15 W. Va. 455, 36 Am. R. 820; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. D. 355; *Lasher v. Williamson*, 55 N. Y. 619; *Osborne v. Bryce*, 23 Fed. R. 171; *Stockton Society v. Giddings*, 96 Cal. 84, 31 A. St. R. 181, 21 L. R. A. 406n; *Hiner v. Newton*, 30 Wis. 640; *Pomeroy's Code Rem.* (3rd Ed.), secs. 149, 150.

29. *Stockton v. Giddings*, *supra*; *Gillespie v. Torrance*, *supra*.

30. *Stockton v. Giddings*, *supra*.

31. See *Scroggin v. Holland*, 16 Mo. 419; *Aultman v. Hefner*, 67 Tex. 54, citing *Bayliss Sur & Guar.* 408; *DeColyar Guar.* 431; *Brandt Guar. & Sur.* 203. Some of these cases were decided under statutes. *Edmunds v. Harper*, 31 Gratt. (Va.) 637; *Bronaugh v. Neal*, 1 Rob. (La.) 23.

32. *Armstrong v. Warner*, 49 Oh. St. 376, 17 L. R. A. 466; *Becker v. Northway*, 44 Minn. 61, 20 Am. St. R. 543 and authorities cited; *McDonald Mfg. Co. v. Moran*, 52 Wis. 203.

33. *Bethervaise v. Lewis*, 7 C. P. 372; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. D. 355; *McHardy v. Wadsworth*, 8 Mich. 350; *Waterman v. Clark*, 76 Ill. 428.

whether it arose before or after the surety became bound, upon general principles of equity.³⁴

34. *Mahurin v. Pearson*, 8 N. H. 539; *Harrison v. Henderson*, 4 Ga. 198; *Livingston v. Marshall*, 82 Ga. 281; *Himrod v. Baugh*, 85 Ill. 435; *Ronehel v. Lofquist*, 46 Ill. App. 442, and cases cited; *Reeves v. Chambers*, 67 Iowa 81; *Spencer v. Almoney*, 56 Md. 551; *St. Paul v. Lock*, 57 Minn. 87, 47 Am. St. R. 576-n; *Concord v. Pillsbury*, 33 N. H. 310; *Wagner v. Stocking*, 22 Ohio St. 297; *Hollister v. Davis*, 54 Pa. 508; *Guggenheim v. Rosenfeld*, 9 Baxt. (Tenn.) 533; *Brundridge v. Whitcomb*, 1 D. Chip. 180; *Downer v. Dana*, 17 Vt. 518; *Wartman v. Yost*, 22 Gratt. (Va.) 595. *Contra*, *Banks v. Pike*, 15 Me. 268; *Walker v. Leighton*, 11 Mass. 140; *Warren v. Wells*, 1 Met. (Mass.) 80; *Robbins v. Brooks*, 42 Mich. 62; *Peine v. Lewis*, 64 Miss. 96. See also, *Dart v. Sherwood*, 7 Wis. 523; *Baltimore, etc. Co. v. Bitner*, 15 W. Va. 455, 36 Am. R. 820.

CHAPTER XIX.

DISCHARGE OF SURETY BY THE ACT OR OPERATION OF LAW.

§ 195. **Discharge of Principal by Act of Law Does not Discharge Surety—In General—Bankruptcy of Principal.** Usually the discharge of the principal by act of the law in which the creditor does not participate, does not discharge the surety. Thus where the accrual of interest against an alien principal was prevented by war, the surety, a citizen, was nevertheless held liable therefor, in spite of the general rule that the liability of the surety is measured by that of the principal,¹ and similar principles apply under the statutes of limitations and of non-claim.² The most familiar example of discharge by operation of law is where the principal is discharged in bankruptcy or insolvency, and the fact that the creditor proves against the principal or even consents to his discharge, as by joining in a composition under the act, is not such a participation therein as will release the surety,³ even though the latter opposed the discharge.⁴ But where the bankruptcy or insolvency proceeding was in a foreign country, it was held that the creditor here, not being bound by such a proceeding unless he voluntarily appeared therein, released his surety by appearing and consenting to a discharge, upon the principle that he had thus, by his voluntary act, destroyed the right of the surety to be subrogated upon payment to the creditor's

1. *Paul v. Christie*, 4 Harris & McH. (Md.) 161; *Bean v. Chapman*, 62 Ala. 58; *Ante*, sec. 89.

2. *Post*, secs. 204 et seq.

3. 1 *Brandt Guar. & Sur.* (3rd Ed.), sec. 168, and cases cited; *Ex parte Jacobs*, L. R. 10, Ch. 211; *Guild v. Butler*, 122 Mass. 498, 23 Am. R. 378, citing the English cases; *Cilley v. Colby*, 61 N. H. 63; *Ray v. Brenner*, 12 Kan. 105. *Contra* on ground of consent by the creditor to such discharge. *Calloway v. Sapp*, 78 Ky. 561.

4. *Ex parte Jacobs*, *supra*; *Ellis v. Wilmot*, L. R. 10 Exch. 10.

remedies against the principal's property here.⁵ Clearly the surety will not be discharged by the bankruptcy of the principal where the creditor's claim against him, being contingent, was not provable under the commission.⁶

The duty of the creditor to prove in bankruptcy against the principal on pain of losing his right to recourse against the surety is discussed in another place.⁷

§ 196. Bankruptcy of Principal as a Bar to Surety's Right to Reimbursement. When the liability of the principal to reimburse his surety has become fixed by payment, the surety becomes subrogated to the rights of the creditor and the sum due the surety becomes a provable claim against the principal's estate, and will be barred by his discharge like any other provable debt.⁸ Even though the discharge of the principal is in bankruptcy proceedings begun after the principal's default but before the surety has paid, the principal is discharged, for under the act of 1898, and under a similar provision of the act of 1867, the surety has a right to prove in the name of the creditor if the creditor fails to prove, or he may pay and be subrogated to the creditor's right to make proof.⁹

5. *Phelps v. Borland*, 103 N. Y. 406, 57 Am. R. 755; *Gardner v. Lee's Bank*, 11 Barb. (N. Y.) 558.

6. *Leffoon v. Kerner*, 138 N. Car. 281; *Leader v. Mattingly*, 140 Ala. 444.

7. See Post, sec. 224.

8. 1 *Brandt Guar. & Sur.* (3rd Ed.), sec. 241; *Smith v. Wheeler*, 55 App. Div. 170, 66 N. Y. Supp. 780; *Hayer v. Comstock*, 115 Ia. 187; *Post v. Losey*, 111 Ind. 74, 60 Am. R. 677; *Hunt v. Taylor*, 108 Mass. 508; *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. R. 607; *Hamilton v. Reynolds*, 88 Ind. 191. Where the principal has made a payment which constitutes an illegal preference under the Act of July 1, 1898, the surety cannot, upon payment, prove his claim against the principal unless such preference is returned to the estate. *Swartz v. Siegel*, 117 Fed. 13, 54 C. C. A. 399; *Livingstone v. Heinemann*, 120 Fed. 786, 57 C. C. A. 154.

9. Post, sec. 224; *Hunt v. Taylor*, 108 Mass. 508; *Smith v. Wheeler*, 55 App. Div. 170, 66 N. Y. Sup. 780; *Post v. Losey*, 111 Ind. 74, 60 Am. R. 677; *Hayer v. Comstock*, 115 Iowa 187; *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. R. 607; *Fairbanks v. Lambert*, 137 Mass. 373. See also, *Mace v. Wells*, 7 How. (U. S.) 272. Com-

§ 197. Bankruptcy of Surety. Where the obligation of the surety or guarantor has become fixed by default of the principal it is a provable claim against the surety and is barred by his discharge in bankruptcy proceedings afterward commenced, and the same is true though it became absolute after the filing of the petition but before the time for proving claims had expired.¹⁰ Where the surety or guarantor's obligation is uncertain and contingent, however, his principal not being in default, there is nothing provable against him, and if his obligation afterward becomes absolute, it is of course unaffected by the discharge.¹¹

§ 198. Change of Parties Where Individual or Firm is Principal or Creditor. A guaranty or suretyship undertaking made or given on behalf of an individual cannot be extended without the consent of the guarantor or surety so as to cover obligations contracted by such individual jointly or with others, and a guaranty or suretyship for performance by several cannot be made to cover the defaults of one or some of them unless they are legally to be deemed the defaults of all. To hold otherwise would be to make a contract for the surety that he did not make for himself, and would violate the rule that a surety, once the terms of his contract are ascertained, has a right to insist that they be strictly adhered to.¹²

pare *Thayer v. Daniels*, 110 Mass. 345, decided under state insolvent law. See also, *Lighton v. Adkins*, 35 Me. 118. After payment by him, but not before, the surety may petition as a creditor in bankruptcy against his principal. *Phillips v. Dreber Shoe Co.*, 112 Fed. 404. See also, *Hill v. Harding*, 130 U. S. 699.

10. In *re Gerson*, 105 Fed. 891; *Mock v. Market St. Nat. Bank*, 107 Fed. 897, 47 C. C. A. 49.

11. See in *re Pettengill*, 137 Fed. 143; *Hibbard v. Bailey*, 129 Fed. 575; *Loeser v. Alexander*, 176 Fed. 265.

12. Ante, sec. 90; 1 Brandt, Sur. & Guar. (3rd Ed.), sec. 136; *Wright v. Russell*, 2 W. Bl. 923, 934; *Lamm & Co. v. Colcord*, 22 Okla. 493, 19 L. R. A. (N. S.) 901, and cases cited in the note; *Harnett v. Smith*, 17 Ill. 565; *Dupree v. Blake*, 148 Ill. 453; *Crane v. Specht*, 39 Neb. 123, 42 Am. St. R. 562, and authorities cited; *Morris & Co. v. Lucker*, 158 Mich. 518, and cases throughout this section.

Upon similar reasoning, if one is surety for a firm, and there is any change in its membership, whether by the admission of a new member,¹³ or the death or retirement of an old one,¹⁴ he is not bound for defaults occurring or credits given after the change was made unless the guaranty, expressly or by fair implication, is extended to meet the change in the personnel of the principal, or unless such change was covered by the terms of the guaranty as originally given, or the defaults may be regarded as those solely of the partner or partners originally guaranteed rather than of the firm.¹⁵

On the other hand, the guarantor or surety is not bound to any but him or those to whom the guarantee was in terms given, and the surety will not be liable for debts contracted or breaches of duty occurring after a similar change in the personnel of the creditor, unless the guaranty can be construed to be intended to meet such change.¹⁶

13. *Backhouse v. Hall*, 34 L. J. Q. B. 141, 144, 12 Eng. Rul. Cas. 475, and authorities cited and discussed; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194. See also, *Bell v. Norwood*, 7 La. 95.

14. *Cambridge University v. Baldwin*, 5 Mees. & W. 580; *Weston v. Barton*, 4 Taunt. 673; *Bill v. Barker*, 16 Gray (Mass.) 62; *Gargan v. School Dist.*, 4 Col. 53; *Backhouse v. Hall*, *supra*; *Barclay v. Lucas*, 1 Term. R. 291, 3 Dougl. 321.

15. See *Roberts v. Griswold*, 35 Vt. 496, 84 Am. D. 641; *Palmer v. Bragg*, 56 N. Y. 523; *Backhouse v. Hall*, *supra*; *Barclay v. Lucas*, *supra*. See Post, sec. 203, as to death of joint principal.

16. *Wright v. Russell*, 2 W. Bl. 934; *Barnett v. Smith*, 17 Ill. 565; *Taylor v. McClurg*, 2 Houst. (Del.) 25; *Smith v. Montgomery*, 3 Tex. 199; *Walsh v. Baillie*, 10 Johns. (N. Y.) 100; *Evansville Bank v. Kaufman*, 93 N. Y. 273, 45 Am. R. 204; *Taylor v. Wetmore*, 10 Oh. 491. As appearing to support a contrary rule, see *Mich. State Bank v. Peck*, 28 Vt. 200; 65 Am. D. 234; *Wadsworth v. Allen*, 8 Grat. (Va.) 174, 56 Am. D. 137. In *Crane v. Specht*, 39 Neb. 123, 42 Am. St. R. 562, it was held that a continuing guaranty in favor of the Crane Bros. Mfg. Co. would not bind the guarantor for debts contracted after its name was changed to the Crane Co., though there was nothing to show any substantial change in its organization, business or management. Compare *First Com'l Bank v. Talbert*, 103 Mich. 625, 50 Am. St. R. 385; *City Nat. Bank v. Phelps*, 97 N. Y. 44, 49 Am. R. 513. Where defendant signed a contract of guaranty for the benefit of a partnership about to extend credit to

§ 199. Death of Principal or Surety—Joint Obligations.

Where the surety or guarantor has entered into an obligation separate and distinct from that of his principal, whether upon the same or a separate paper, his death does not discharge his estate from liability for prior defaults of the principal or for subsequent defaults, at least where the guaranty is a continuing one, in the sense that it relates to a continuing office or employment into which the principal has been inducted on the faith of the guaranty, and is not expressly or impliedly limited to the lifetime of the surety.¹⁷ But where the obligation of the principal and surety is joint, rather than joint and several, the death of the surety discharges his estate both at common law and in equity, whether he be a surety or strictly a joint debtor, unless, in the latter case, the joint obligation be a partnership one;¹⁸ and this has been held where the principal and surety, though jointly and severally bound by the original contract, had become liable upon a joint judgment based thereon.¹⁹

The reason for this rule is found in the common law doctrine, that undischarged joint obligations survive both as to their burdens and their benefits, the rights thereunder devolving upon the last surviving obligee or his estate, and the burdens upon the last surviving obligor or his estate.²⁰ The death of a surety who is bound

the principal, and the name of the firm as written in the guaranty was subsequently changed to that of a corporation which succeeded the firm, the corporation could not show by parol that the parties really intended that the contract should be with the corporation. *Morris & Co. v. Lucker*, 158 Mich. 518. See *Grant v. Naylor*, 4 Cranch. (U. S.) 224.

17. Post, sec. 202.

18. *Risley v. Brown*, 67 N. Y. 160.

19. *United States v. Price*, 9 How. (U. S.) 83; *United States v. Archer's Exrs.*, 1 Wall. Jr. 173. See also, *Smith v. Osborne*, 31 Hun (N. Y.) 390. The lien of a joint judgment is held not affected by the death of one joint debtor. *Baskin v. Huntington*, 130 N. Y. 313.

20. 3 Williams on Exrs. 240; *Osborne v. Crobern*, 1 Sid. 238, and cases cited below.

by a joint obligation therefore discharges his estate, in the absence of statute to the contrary, both at law and in equity.²¹ But it may always be shown in equity to charge the surety's estate that the obligation that he signed was intended to be joint and several, and was expressed to be joint by reason of fraud or mistake,²² and where an obligation is joint, and it appears that the party whose estate is sought to be charged participated directly or beneficially in the consideration, a presumption arises in equity, out of the very equities of the situation, that the obligation was intended to be joint and several rather than joint, a presumption not usually indulged where the deceased was a strict surety, for he may have had the obligation made joint with special reference to the contingency of his death.²³ In fact American decisions are not wanting that seem to regard the presump-

21. *Richardson v. Horton*, 6 Beav. 185; *Rawstone v. Parr*, 3 Russ. 539; *Jones v. Beach*, 2 D. M. & G. 886, 2 Mer. 30; *Other v. Iveson*, 3 Drew. 177; *U. S. v. Price*, 9 How. 92; *Pickersgill v. Lahens*, 15 Wall. 140 (affirming *Fielden v. Lahens*, 6 Blatchf. 524); *Town v. Amidown*, 20 Pick. (Mass.) 535; *Dorsey v. Dorsey*, 2 Har. & J. (Md.) 480; *Waters v. Riley*, 2 Har. & G. (Md.) 305, 18 Am. D. 302; *Dixon v. Vandenburg*, 35 N. J. Eq. 47, 49; *Getty v. Binsse*, 49 N. Y. 385, 10 Am. R. 379; *Wood v. Fisk*, 63 N. Y. 245, 20 Am. R. 528; *Risley v. Brown*, 67 N. Y. 160; *Hauck v. Craighead*, 67 N. Y. 432; *Randall v. Sackett*, 77 N. Y. 480; *Chard v. Hamilton*, 125 N. Y. 777, (affirming s. c. 56 Hun, 259); *Douglass v. Ferris*, 138 N. Y. 192, 207, 34 Am. St. R. 435; *Raynor v. Laux*, 28 Hun 35; *Carpenter v. Provost*, 2 Sandf. 537; *Davis v. Van Buren*, 6 Daly 391; *Weaver v. Shryock*, 6 S. & R. 262; *Kennedy v. Carpenter*, 2 Whart. 344; *Pecker v. Julius*, 2 P. A. Browne 31; *Harrison v. Field*, 2 Wash. (Va.) 136. As to the remedy of the surviving surety or sureties to proceed against the estate of their deceased co-surety for contribution, see *Ante*, sec. 164. If a several judgment is obtained against a surety on a joint obligation, his death afterward does not discharge it. *Smith v. Osborne*, 31 Hun (N. Y.) 390.

22. *U. S. v. Cushman*, 2 Sumn. (U. S.) 324; *Harrison v. Field*, 2 Wash. (Va.) 136; *Olmstead v. Olmstead*, 38 Conn. 309; *Waters v. Riley*, 2 Harr. & G. (Md.) 305, 18 Am. D. 302; *Prior v. Williams*, 2 Abb. App. (N. Y.) 624, 627. The parties may subsequently, by mutual agreement, change the joint to a joint and several obligation. See *Jones v. Beach*, 2 De Gex M. & G. 889.

23. *Pickersgill v. Lahens*, 15 Wall. (U. S.) 140. See *Leffingwell v. Treyer*, 21 Wis. 392.

tion of mistake, where the deceased participated beneficially in the consideration, as an absolute one, on the ground that absolute equality of obligation must be deemed to have been the intention of the parties.²⁴

The rule that the death of a surety bound by a joint obligation discharges his estate has doubtless, on the whole, been productive of injustice, and has been changed by statute in a number of states.²⁵

§ 200. Same—Joint and Several Promisors. Where parties are severally or jointly and severally bound for the same obligation, though one or some of them be sureties, the death of one of them does not, even at common law, cast the whole burden upon the survivors, but an action will lie against the survivor or against the estate of the deceased obligor.²⁶

§ 201. Effect of Surety's Death as to Liability for Future Advances to Principal. Where the undertaking of the guarantor is to be responsible for goods to be sold or moneys to be advanced in the future, it is held by some authorities to be in the nature of an offer or authority to sell goods or advance money on the credit of the guarantor, and like any other offer, or any other author-

24. See *Pickersgill v. Lahens*, 15 Wall. 140, 144; *Waters v. Riley*, 2 Har. & G. (Md.) 305, 18 Am. D. 302; *Marshall v. De Groot*, 1 Cal. Cas. (N. Y.) 122; *Smith v. Ballentine*, 10 Paige 101; *Bradley v. Burwell*, 3 Den. 61; *Hengst's App.*, 24 Pa. 413.

25. Statutes found in many states changing joint to joint and several obligations doubtless operate upon sureties unless they are expressly excepted from their terms, and in some states are statutes providing directly in terms that the estate of a surety on a joint obligation shall not be discharged by his death. *Harrison v. Thackaberry*, 248 Ill. 512, 516; *Kaestner v. First Nat. Bank*, 170 Ill. 322. See also, *Glasscock v. Hamilton*, 62 Tex. 143.

26. *Collins v. Griffith*, 2 P. Wms. 313; *Pickersgill v. Lahens*, 15 Wall. (U. S.) 141; *Glasscock v. Hamilton*, 62 Tex. 143. But the executor of the deceased promisor cannot be sued jointly with the survivor in an action at law for otherwise judgment would have to be rendered against them in different capacities. *Hall v. Huffam*, 2 Lev. 228. This rule has doubtless been changed in some states by statutes.

ity not coupled with an interest, is revocable by notice by the guarantor to the creditor during life, and is also ipso facto revoked by his death.²⁷

But not all the cases hold that death ipso facto revokes the guaranty of future advances even when it might have been revoked by notice during life, and there is much authority and reason for the rule that notice or knowledge of the guarantor's death must reach the creditor before the credit is given for which the guarantor's estate is sought to be held, otherwise the estate will be liable.²⁸

If the parties agree that the estate of the guarantor or surety shall be bound unless notice be given, liability will arise for advances made after death of the guarantor but before the stipulated notice is given.²⁹

27. *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. R. 305; *Hyland v. Habich*, 150 Mass. 112, 15 Am. St. R. 174, 6 L. R. A. 383; *Michigan State Bank v. Est. of Leavenworth*, 28 Vt. 210; *Aitken v. Lang*, 106 Ky. 652, 90 Am. St. R. 263. See *Offord v. Davies*, 12 C. B. (N. S.) 748. The fact that the instrument of guaranty is under seal does not change this construction. *Jordan v. Dobbins*, supra. An accommodation party to a bill or note may revoke his signature before advances are made on the faith of it, and his death has that effect as to any person advancing money upon it with knowledge both of its accommodation character and the signer's death. *Clark v. Thayer*, 105 Mass. 215, and cases cited. It has also been held that death of the accommodation signer revokes his signature as to one advancing money on the faith of it with knowledge of its accommodation character. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11, and cases cited and discussed. In this last case, however, the paper was executed in blank and the court treated the case as one involving a power not coupled with an interest, and the fact that it was executed in blank was held notice in itself of its accommodation character.

28. *Dodd v. Whelan*, 1 Ir. Rep. 595; *Harriss v. Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. 866; *Coulhart v. Clementson*, L. R. 5 Q. B. Div. 42; *Gay v. Ward*, 67 Conn. 147, 32 L. R. A. 818; *National Eagle Bank v. Hunt*, 16 R. I. 148, 153; *Kernochan v. Murray*, 111 N. Y. 306, 2 L. R. A. 183, 7 Am. St. 744; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 400, 55 Am. R. 427; *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. D. 610. See also, *Bradbury v. Morgan*, 1 H. & C. 249.

29. *In re Silvester* (1895), 1 Ch. 573. See *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143.

§ 202. **Same—Death of Surety or Guarantor for Principal in Particular Office or Employment.** When upon the execution of a suretyship undertaking the principal has been inducted to a particular office or employment, the death of the surety is not such a contingency as will terminate the liability of his estate in the absence of some provision of law or some term in the contract. The transaction is a contract and not a mere offer or authority. A leading case on this subject is *Lloyd's v. Harper*.³⁰ In this case the principal applied for admission as an underwriting member of "Lloyd's," and pursuant to a rule of that association requiring a guarantee, his father undertook to be responsible for his engagements as such member, as follows: "My son, Robert Henry Harper, being a candidate for admission to Lloyd's as an underwriting member, I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity." It was held that this guaranty was not terminated by the death of the father, and that the representatives of the father were bound for defaults occurring after his death for all engagements of the son as an underwriting member of Lloyd's. The opinion, per James, L. J., among other things says: "But here the consideration is given once for all, just as in the case of the granting of a lease in which a third party guarantees the payment of the rent and the performance of the covenants. The father undertakes that if the son is admitted to the status of an underwriting member, he, the father, will guarantee all the son's engagements as such member. The moment the son was admitted to that status he became entitled to retain it until he had done some act which, under the rules, deprived him of his right to retain it. If the testator could at any time have determined the guarantee, he could have determined it the next day. The moment the son was admitted to the status of an underwriting member with all its privileges, if the father

was at liberty to say, 'I withdraw the guarantee,' then the guarantee would have been utterly futile and idle. If it could not be determined by him the next day, there would be no time at which he could have a power of determining it. That being so, it appears to me that his estate is still liable for all the engagements which the son entered into with the person who effected policies of insurance with him."³¹ Similar principles apply where the suretyship is for the performance of the lessee's covenants in a lease,³² and the rule has been applied to a cost bond, as to costs incurred after the death of the surety.³³

§ 203. Death of Joint Principal. The effect of the death of the principal, or of one or more joint principals, upon the liability of the guarantor or surety depends upon the nature of the obligation for which the guarantor or surety is answerable, and the language and circumstances of the undertaking.

If one becomes surety for an ordinary debt the death of the principal will not release him, and if he is surety for the existing debt of several co-promisors, he is liable notwithstanding the death of one of them.³⁴

31. As supporting this rule, see *Calvert v. Gordon*, 2 Sim. 253, 4 Russ. 581; *In re Crace*, *Balfour v. Crace* (1902), 1 Ch. Div. 733; *Broome v. U. S.*, 15 How. (U. S.) 143; *Royal Ins. Co. v. Davies*, 49 Iowa 469, 20 Am. R. 581; *Est. of Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. R. 427; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Vons v. State*, 47 Ind. 345 (under statute); *Mowbray v. State*, 88 Ind. 324; *Wood v. Leland*, 1 Met. (Mass.) 387; *Carr v. Ladd*, *Smith (N. H.)* 45, *Ames' Cas. on Sur.* 337; *Green v. Young*, 8 Greenl. (Me.) 14, 22 Am. D. 218; *Shackamaxon Bank v. Yard*, 143 Pa. 129, 24 Am. St. Rep. 521; *Snyder v. State*, 5 Wyo. 318, 63 Am. St. R. 60; *Hecht v. Weaver*, 34 Fed. 111. Compare *Reilly v. Dodge*, 131 N. Y. 153, 158, 159.

32. *Lloyd v. Harper*, 16 Ch. Div. 290; *Holthausen v. Kells*, 18 N. Y. App. Div. 80; *Coe v. Vogdes*, 71 Pa. 383. See and compare *Pleasanton's Appeal*, 75 Pa. 344.

33. *McCloskey v. Barr*, 79 Fed. 408; *Fewlass v. Keeshan*, 88 Fed. 573.

34. *Brooks v. Hope*, 139 Mass. 361; *Dobyns v. McGovern*, 15 Mo. 662.

But where the sureties enter into an undertaking for performance by several of an obligation involving the peculiar skill, diligence, integrity and accuracy of all of them, as in the case of co-partners, though they are associated as such for the particular undertaking only, the death of one of them releases the surety, at least as to subsequent defaults, on the ground that the surety must be presumed to have relied upon the peculiar personal qualities of all of them including the deceased,³⁵ unless the language of the contract extends it to survivors, or the principal is described as a class, company, bank, or the like, so as to plainly imply that the security is given for that class or body regardless of changes in the integral parts.³⁶

§ 204. Lapse of Time—Statute of Limitations and Laches of the Creditor. While the common law presumption of payment after twenty years doubtless applies to the undertaking of a surety, he cannot, independent of statutes of limitations, defend on the mere ground of the neglect of the creditor to sue the principal, however long continued, unless he has, by notice where he has a right to do so, or by a proceeding in equity, quickened the steps of the creditor against the principal. The reasoning upon which the cases proceed is that the surety may himself pay at any time and proceed against his principal for indemnity, and that the neglect is as much his own as that of the creditor.³⁷

35. Ante, sec. 198; *Weston v. Barton*, 4 Taunt. 673; *University of Cambridge v. Baldwin*, 5 M. & W. 585; *Simpson v. Cook*, 1 Bing. 452; *Myers v. Edge*, 7 Term. Rep. (D. & E.) 254; *Strange v. Lee*, 3 East 484; *Cremer v. Higginson*, 1 Mason, 337, Fed. Cas. 3383; *Smith v. Montgomery*, 3 Tex. 203; *Gargan v. School Dist.*, 7 Col. 53.

36. *Barclay v. Lucas*, 1 Term. R. 291; *Gargan v. School Dist.* supra.

37. Ante, sec. 224, and cases cited; *Strong v. Foster*, 17 C. B. 201; *White v. Life Assn. of America*, 63 Ala. 419, 35 Am. R. 45; *Creath's Adm'r v. Sims*, 5 How. (U. S.) 192; *Nelson v. First Nat. Bank of Killingley*, 69 Fed. 798, 16 C. C. A. 425; *Allen v. Hopkins*, 98 Ky. 668, 56 Am. St. R. 382.

These cases must of course be distinguished from those in which there is a valid extension of time to the principal without the consent of the surety.³⁸

The statute of limitations may have run against the principal alone or against the surety alone, or against both; and it will run against the surety, not from the time he becomes bound as such, but from the time when an action might be brought against him, which is ordinarily the moment his principal is in default so that an action would lie against him.³⁹ Still, an action may accrue against the principal at one time and against the surety at another, and the statute will not run in favor of the surety until the cause of action accrues against him. Thus, where the contract is to indemnify and save harmless the obligee *against loss or damage* due to the defaults of the principal, the statute is held to run against the surety, not from the time of the default, but from the time of the resultant damage.⁴⁰

The statute of limitations may sometimes run in favor of the principal, but not in favor of the surety, as where he is absent or removes from the state. Where this is the case, the surety cannot, by the weight of authority, avail himself of the fact that the statute has run in favor of the principal.⁴¹ The usual ground of these decisions is that the surety has it in his power to

38. Post, sec. 225.

39. *State Bank v. Knotts*, 10 Rich. Law 543, 70 Am. D. 234; *McGovern v. Rectanus*, 32 Ky. Law 364, 14 L. R. A. (N. S.) 380.

40. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282; *Wilson v. Stilwell*, 9 Ohio St. 468, 75 Am. D. 477, and note at p. 478; *Wilson v. Stilwell*, 14 Ohio St. 464; *American Building and Loan Assn. v. Waleen*, 52 Minn. 23; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. D. 359, and note at p. 362.

41. *McBroom v. Governor*, 6 Part. (Ala.) 32; *Hooks v. Bank*, 8 Ala. 580; *Dye v. Dye*, 21 Oh. St. 86, 8 Am. R. 40; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Richards v. Com.*, 40 Pa. 146; *Nelson v. Bank*, 69 Fed. 798, 16 C. C. A. 425, 32 U. S. App. 554; *Whiting v. Clark*, 17 Cal. 407; *Willis v. Chowning*, 90 Tex. 617, 69 Am. St. R. 842. *Contra*, *Auchampaugh v. Schmidt*, 70 Ia. 642, 59 Am. R. 459. See also, *Northern Assurance Co. v. Borgelt*, 67 Neb. 282; *Bernd v. Lynes*, 71 Conn. 733..

pay the debt and have indemnity from his principal at any time after the latter is in default, or may take steps to compel the creditor to sue the principal or the principal to pay.⁴² Similar principles have been held to apply under statutes of non-claim, and a surety or absolute guarantor cannot take advantage of the creditor's failure to file or present his claims against the estate of his deceased principal, even though he requested the surety to do so, for he could have paid the debt and filed his claim for reimbursement, and there is no duty of active diligence on the part of the creditor, unless his steps are quickened by a court of equity.⁴³

The effect of the statutes of limitations on the surety's right to reimbursement is stated elsewhere.⁴⁴

§ 205. May Principal Waive Benefit of Statute of Limitations so as to Bind Surety? It was held in the leading case of *Whitcomb v. Whiting*,⁴⁵ per Lord Mansfield, that one co-obligor might revive against the other a debt barred by the statute of limitations, upon the theory that part payment or an admission by one was payment or an admission for all as to the debt of all, the one acting virtually as agent for the rest; and it made no difference that one party was a surety.⁴⁶ But this rule has

42. Post, sec. 224; *Whiting v. Clark*, 17 Cal. 407, and cases cited supra.

43. See cases cited supra and *Villars v. Palmer*, 67 Ill. 204; *Bull v. Cole*, 77 Cal. 54, 11 Am. St. R. 235; *Hooks & Wright v. Branch Bank of Mobile*, 8 Ala. 580; *People v. Whittemore*, 253 Ill. 378; *Yerxa v. Ruthruff*, 19 N. Dak. 13, 25 L. R. A. (N. S.) 139, and cases cited in the opinion and in the note to this point, and to the point that the failure of the creditor to file in bankruptcy against the principal does not release the surety. *Contra*, *Seibert v. Queinel*, 65 Minn. 107, 60 Am. St. R. 441; *Stull v. Davidson*, 12 Bush. (Ky.) 167; *Bridges v. Blake*, 106 Ind. 332; *McCullom v. Hinckley*, 9 Vt. 143. See *Ohio v. Blake*, 2 Oh. St. 147; *Huddleston v. Francis*, 124 Ill. 195 (decided under statute). Compare *People v. Whittemore*, supra.

44. Ante, sec. 124.

45. 2 Doug. 652 (1781).

46. To the same effect, see *Burleigh v. Scott*, 8 B. & C. 36; *Dowling v. Ford*, 11 M. & W. 329; *Wyatt v. Hodson*, 8 Bing. 308; *Perham v. Rynall*, 2 Moo. C. P. 566; *Clinton Co. v. Smith*, 238 Mo. 118, 37 L. R. A. (N. S.) 272; *Clark v. Sigourney*, 17 Conn. 511.

been changed by statute in England, and by statute or decisions in nearly all of our states,⁴⁷ though it still exists in a few jurisdictions as to claims not completely barred,⁴⁸ and where the obligation is strictly separate or several as in the case of maker and indorser, or principal and guarantor, rather than joint, or joint and several, the rule of *Whitcomb v. Whiting* is wholly inapplicable.⁴⁹ And so where it becomes several by the death of the surety.⁵⁰

§ 206. When Statute Runs Where Principal's Fraud Is Concealed. Where the principal for whose honesty and fidelity a surety is bound fraudulently conceals his defalcations, it is usually held that the statute of limitations does not begin to run against the surety until the default of the principal is discovered, or might by ordinary diligence have been discovered, unless the creditor has himself been guilty of bad faith, and it makes no difference that the surety is entirely innocent of fraud. The liability of his principal is the measure of his own,

47. See *Mozingo v. Ross*, 150 Ind. 688, 65 Am. St. R. 387, 41 L. R. A. 612; *Van Kuren v. Parmerlee*, 2 N. Y. 533; *Davis v. Clark*, 58 Kan. 454; *Whipple v. Stevens*, 22 N. H. 219; *Coleman v. Forbes*, 22 Pa. 156, 60 Am. D. 75; *Walters v. Craft*, 23 S. Car. 578, 55 Am. R. 44; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. R. 47.

48. *Cross v. Allen*, 141 U. S. 528; *Clark v. Sigourney*, supra; *Cox v. Bailey*, 9 Ga. 467, 54 Am. D. 358; *Tillinghast v. Nourse*, 14 Ga. 641; *Rogers v. Gibbs*, 24 La. An. 467; *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. R. 496; *Block v. Dorman*, 51 Mo. 31; *Corlies v. Fleming*, 30 N. J. L. 349; *Copeland v. Collins*, 122 N. Car. 619; *Woonsocket Inst. v. Ballou*, 16 R. I. 355; *Bordell v. Peay*, 20 Ark. 293; *Long v. Miller*, 93 N. C. 227; *Goudy v. Gillam*, 6 Rich. Law (S. C.) 28; *Mozingo v. Ross*, 150 Ind. 688, 41 L. R. A. 612, 65 Am. St. R. 687.

49. *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. R. 678, 41 L. R. A. 581; *Hunter v. Robertson*, 30 Ga. 479; *Meade v. McDowell*, 5 Bin. (Pa.) 195. In *re Wolmershausen*, 62 Law Times (N. S.) 541. See *Cross v. Allen*, supra; *Copeland v. Collins*, supra.

50. *Atkin v. Tredgold*, 2 B. & C. 23; *Disbrough v. Bedleman*, 1 Zab. (N. J.) 677; *Lane v. Doty*, 4 Barb. (N. Y.) 530; *Hathaway v. Haskell*, 9 Pick. (Mass.) 42. Further on this subject see the extended note to *Whitcomb v. Whiting*, in 1 Sm. Lead. Cas., pt. 2, p. 983, and the extended discussion and citation in 37 L. R. A. (N. S.) 274.

and he can stand in no better position than the principal.⁵¹

51. *Bailey v. Glover*, 21 Wall. (U. S.) 342; *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. R. 75; *Lieberman v. Wilmington First Nat. Bank*, 2 Pennw. (R. I.) 416, 82 Am. St. R. 414, 48 L. R. A. 514; *Bradford v. McCormick*, 71 Ia. 129; *Shelby County v. Bragg*, 135 Mo. 291; *Ward v. Marion County*, 26 Tex. Civ. App. 361; *McMullen v. Winfield Building & Loan Assn.*, 64 Kan. 298; *Wayne v. Com. Nat. Bank*, 52 Pa. 343; *Taypley v. Martin*, 116 Mass. 275. In a few states the rule of the text is recognized in equity but not at law. See *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Wood on Lim.* (2nd Ed.), 139, 141 and local statutes touching limitations where there is fraud concealed.

CHAPTER XX.

DISCHARGE OF SURETY BY RETENTION OF DEFAULTING OFFICER, AGENT, OR SERVANT. CORPORATE SURETY BOND—SUPERVISION OF RISK BY EMPLOYEE.

§ 207. **Rule Stated—Dishonesty or Other Defaults—Knowledge of Default.** The rule is generally well settled, both here and in England, that where the surety is liable upon a continuing undertaking for the honesty of a servant, if the servant has been guilty of acts of dishonesty in the course of the service to which the suretyship relates, it is the duty of the master, upon discovering the fact, to discharge him, or to disclose such dishonesty to the surety and secure his consent to the continuance of the employment, even though no term in the contract requires it, and if he fails to do this he cannot afterward have recourse to the surety for any loss that may arise from the dishonesty of the servant during the remaining period of the employment.¹ This rule is founded not only upon obvious considerations of justice and fairness to the surety and the implied intention and expectations of the parties, but has been said to rest upon the equities which inhere in the suretyship undertaking, and which require the creditor to use for the benefit of the surety such remedies for the protection of the surety as may be at his command, or at least such of them as would be lost to the surety by the creditor's positive act or neglect, and which the surety

1. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Smith v. Bank of Scotland*, 1 Dow. 287 (obiter); *Burgess v. Eve*, 13 L. R. Eq. 450 (obiter); *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. R. 210; *Rapp v. Phoenix Co.*, 113 Ill. 390, 55 Am. R. 427; *Donnell Co. v. Jones*, 66 Ill. App. 327; *La Rose v. Logansport Bank*, 102 Ind. 332; *Newark v. Stout*, 52 N. J. 35; *Colby Wringer Co. v. Coon*, 116 Mich. 208; *Pacific Fire Ins. Co. v. Pacific Surety Co.*, 93 Col. 713; *Emery v. Baltz*, 94 N. Y. 408; *Wilmington C. & A. R. Co. v. Ling*, 18 S. Car. 116. Practically all the cases throughout this section recognize this general principle.

cannot exercise for himself.² There is no doubt that these principles are as applicable to a corporate fidelity bond as to the bond of private sureties, even though the former contains no express provision on the subject.³

Where the default or breach of duty of the servant does not amount to positive dishonesty, however, it seems that the rule requiring disclosure is not deemed to apply, at least in this country, in the absence of special agreement.⁴ The rule, furthermore, seems to be quite strictly confined, in the absence of special terms in the suretyship contract, to cases where the employer has actual knowledge of the dishonesty of the principal, and the surety is not exonerated by the gross neglect of the employer in failing to discover such dishonesty unless, indeed, such negligence amounts to bad faith;⁵ and the retention of the servant after the principal has obtained knowledge of his immorality, or even perhaps his dishonesty outside of the bonded employment, does not release the surety.⁶

2. See the concurring opinion of Blackburn, J., in *Phillips v. Foxall*, *supra*. See also, *Saint v. Wheeler*, *supra*.

3. *National Bank v. Fid. & Cas. Co.*, 32 C. C. A. 355, 89 Fed. 819.

4. *Atlantic & Pac. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. R. 621; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. R. 196; *Pittsburg, etc. Ry. Co. v. Shaeffer*, 59 Pa. 350; *Bank v. Tumbler Co.*, 172 Pa. at p. 626; *Wilkerson v. Crescent Co.*, 64 Ark. 80, 62 Am. St. R. 152; *Charlotte Co. v. Gow*, 59 Ga. 685, 27 Am. R. 403; *Home Co. v. Holway*, 55 Iowa 571, 39 Am. R. 179; *Phoenix Co. v. Findley*, 59 Iowa 591; *Aetna Co. v. Fowler*, 108 Mich. 557; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. R. 475; *Manchester Co. v. Redfield*, 69 Minn. 10; *Wilmington Co. v. Ling*, 18 S. Car. 116; *Richmond, etc. Co. v. Kasey*, 30 Gratt. (Va.) 218; *La Rose v. Logansport Bank*, 102 Ind. 332. See *Herbert v. Lee*, 118 Tenn. 133, 12 L. R. A. (N. S.) 247 and note. Compare *Sanderson v. Aston*, L. R. 8 Exch. 73; *Emery v. Baltz*, 94 N. Y. 408, 414. See *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. R. 281, and cases cited and reviewed.

5. *Colby Co. v. Coon*, 116 Mich. 208; *Newark v. Stout*, *supra*; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. R. 231; *Frelinghuysen v. Baldwin*, 16 Fed. R. 452; *Phillips v. Bossard*, 35 Fed. R. 99; *Fidelity & Casualty Co. v. Bank*, 97 Ga. 634, 33 L. R. A. 821, 54 Am. St. R. 821; *Guarantee Co. of North Am. v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146.

6. *La Rose v. Logansport Bank*, 102 Ind. 332.

There are cases that deny the general application of the doctrine that an employer who retains a servant after knowledge of his dishonesty in his employment acts at his own risk unless he notifies the surety and obtains his consent. These authorities, however, appear to be confined to cases of suretyship for the officers or agents of corporations, and are based upon the ground that to hold a corporation to the general rule would be to say that it guarantees to the surety of one of its officers or agents the fidelity of its other officers and agents, and would make it possible where there is a general conspiracy between all the officers and agents of the corporation that all their sureties might be discharged.⁷ If this doctrine be sound even in its application to corporations, it should, it would seem, be confined to such cases as disclose conspiracy on the part of the principal and such corporate officers or agents as, having knowledge of the principal's default, are under a legal duty to make known the fact to the company, or to cases where there is a sinister motive on the part of such officers and agents in concealing the principal's default.⁸ Where the government or a public corporation is the obligee, however, the surety may continue bound notwithstanding the neglect of its officers to discharge the principal upon knowledge of his delinquency, even though there be no suggestion of conspiracy or corrupt silence and inaction on their part, for laches is not to be imputed to the government, and those who execute official bonds are presumed to do so with full knowledge of this principle and consent to be bound accordingly.⁹ In no case

7. See *Pittsburgh, etc. Ry. v. Shaeffer*, 59 Pa. St. 356; *Fidelity & Casualty Co. v. Bank*, 97 Ga. 634, 33 L. R. A. 821, 54 Am. St. R. 440; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh 565; *McShane v. Howard Bank*, 73 Md. 135, 10 L. R. A. 552.

8. *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. R. 210; *McShane v. Howard Bank*, *supra*.

9. See *Reg. v. Fay*, 4 L. R. Ir. 606; *Hart v. United States*, 95 U. S. 316, 318, and cases cited; 2 *Brandt on Sur. & Guar.* (3rd Ed.), secs. 671, 672 and cases cited. See Post, sec. 276, where the subject of laches and its effect upon official bonds is stated.

would the failure of an officer or agent, even of a private corporation, to make known the default of another officer or agent be imputed to the obligee, where it was no part of the duty of the former to supervise the conduct of the defaulting principal, or exercise authority over him.¹⁰

§ 208. Same—Special Terms in Surety's Contract—Supervision of Bonded Officer or Employee—Corporate Fidelity Bonds. The suretyship contract, however, may impose special terms upon the employer regarding notice of the irregularities or defaults of the principal, and the conditions imposing special duties upon the obligee in corporate guaranty and fidelity bonds in this respect have already been considered.¹¹

Under a fidelity bond containing no terms requiring it the obligee is not bound, so long as he observes good faith, to exercise special supervision of his employee or to adopt any particular measures to prevent or ascertain his default.¹² Most bonds of this kind, however, contain special provisions in this behalf, a common one being that the bond is made and accepted by the obligee upon the condition or "upon the basis" that there shall be a careful periodic examination of the accounts of the risk, either as stipulated in the body of the bond, or that that there will be such examinations and accounting as is stated in the application. Such provisions are in the nature of promissory warranties or conditions subsequent, and non-compliance therewith, avoids the bond.¹³

10. This rule is applicable to fidelity bonds. See *Saint v. Wheeler*, *supra*.

11. *Ante*, secs. 187 et seq. See *Pacific Fire Ins. Co. v. Pacific Surety Co.*, 93 Col. 7.

12. *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634, 33 L. R. A. 821, 54 Am. St. R. 440.

13. As sustaining the rule of the text and as instructive on this subject see *Hunt v. Fidelity & Casualty Co.*, 99 Fed. 242, 39 C. C. A. 496; *Sinclair Co. v. Nat. Surety Co.*, 132 Ia. 549; *U. S. Fid. & Guar. Co. v. Downey*, 38 Col. 414, 10 L. R. A. (N. S.) 323 and notes. See also, *U. S. Fid. & Guar. Co. v. Foster Bank*, 148 Ky. 776; *infra*, note 16. A clause requiring "due and customary supervision"

But it has been held under a provision requiring monthly audits which were made, that a statement that the accounts of the principal had been examined and found correct was not a warranty, and the bond was not avoided by its falsity, where it was made in good faith after an audit by a reasonably competent person who failed to discover a shortage, owing to fraudulent book-keeping devices of the risk.¹⁴

But an undertaking in the bond that the books and accounts of a bank cashier will be examined and verified every three months with funds and property on hand and in bank is not satisfied by an examination which accepts as true the amount which he has in bank as disclosed by his pass book, without any steps to ascertain whether it represented the true state of the risk's account. This did not constitute verification.¹⁵

Stipulations of the character above considered, are in the nature of conditions subsequent and their breach is matter of defense, the onus of pleading and proving which is upon the company.¹⁶

of the employee has been held to require such supervision as ordinarily prudent business men would give under like circumstances. *Bank of Tarboro v. Fidelity & Dep. Co.*, 128 N. Car. 366, 126 N. Car. 320, 83 Am. St. R. 682. See also, *Sinclair Co. v. Nat. Sur. Co.*, supra. In *Am. Bonding Co. v. Morrow*, 80 Ark. 49, 117 Am. St. R. 72, substantially the same view was taken under a clause requiring an examination by an auditing committee of bank directors. It was enough that the examination was made in good faith by such committee without employing an expert accountant. See also, *Southern Surety Co. v. Tyler*, 30 Okla. 116, 123, and cases cited and reviewed.

14. *Title Guar. & Surety Co. v. Nichols*, 224 U. S. 346; *U. S. Fid. & Guar. Co. v. Foster Bank*, supra; *Fidelity & Guar. Co. v. Western Bank*, 29 Ky. L. 639; *Remington v. Fidelity & Dep. Co.*, 27 Wash. 429, 441, and cases cited. See *Guarantee Co. of N. A. v. Mechanics, etc. Co.*, 26 C. C. A., 146, 40 U. S. App. 91, 80 Fed. 766. Diligence under such a condition or representation is usually a jury question. *Title Guar. & Sur. Co. v. Nichols*, supra.

15. *U. S. Fid. & Guar. Co. v. Downey*, 38 Col. 414, 10 L. R. A. (N. S.) 323. See also *Hunt v. Fidelity Co.*, 39 C. C. A. 496, 99 Fed. 242.

16. *Title Guar. & Sur. Co. v. Nichols*, 224 U. S. 346, and cases cited; *Redman v. Etna Ins. Co.*, 49 Wis. 431; *Sinclair & Co. v. National Surety Co.*, 132 Ia. 541, 560.

CHAPTER XXI.

ALTERATION OR VARIATION OF PRINCIPAL'S CONTRACT OR OF SURETY'S RISK WITHOUT SURETY'S CONSENT.

§ 209. **Alteration or Variation of the Terms of Principal's Contract—In General.** Nothing is better settled than that the contract of a guarantor or surety is *strictissimi juris*, and that he has a right to stand upon the strict terms of his undertaking, once the scope and meaning of these terms are ascertained.¹ Furthermore the contract between the principal and the creditor is the surety's as well as their own, and when they have materially varied or altered it without his consent, whether to his disadvantage or not, the surety and any property he may have pledged or mortgaged for the debt is released, pursuant to the familiar maxim *non haec in foedera veni*.² It follows from this that any material change in the contract between principal and creditor, whether (1) by a material alteration of its written terms, or (2) by any modifying agreement, or (3) by a material departure by mutual consent of the principal and the creditor or obligee from the mode of performance originally contemplated and provided for, without the consent

1. Ante, sec. 90, and cases cited throughout this section; Grant v. Smith, 46 N. Y. 96 and authorities cited.

2. Taylor v. Bank of New South Wales, 11 App. Cas. 596; Polak v. Everett, L. R. 1 Q. B. D. 669; Holme v. Brunskill, L. R. 3 Q. B. D. 495, Miller v. Stewart, 9 Wheat. (U. S.) 681; Wood v. Steele, 6 Wall. (U. S.) 80; Reese v. U. S., 9 Wall. (U. S.) 14; Board of Commissioners v. Branham, 57 Fed. 179; Zeigler v. Hallahan, 131 Fed. 205, 66 C. C. A. 1; Hibbs v. Rue, 4 Pa. St. 348; Grant v. Smith, *supra*; Bensinger v. Wren, 100 Pa. 505; Bethune v. Dozier, 10 Ga. 235, and cases cited; Driscoll v. Winters, 122 Cal. 65; Greenfield Bank v. Stowell, 123 Mass. 196, 25 Am. R. 67, and cases cited, and cases in the next note; Robbins v. Robinson, 175 Pa. 341. Compare Brandrup v. Empire St. Sur. Co., 111 Minn. 376.

of the surety or guarantor, will, in general, discharge the latter.³

A distinction is generally made, however, between alterations of the written instrument of contract between principal and creditor, and the waiver of its performance or a new contract, as to such provisions merely as are plainly meant for the sole protection of the creditor or promisee, as where payment of an installment earned under a contract for particular work is made on the certificate of one engineer instead of two, as provided there in, but no more is paid than would have been payable had the certificate of both been given. Alterations of the first sort release the non-assenting surety, while those of the second kind do not.⁴

§ 210. Same — Alteration by Stranger — Spoliation.
Alteration of a written contract by a stranger, without

3. Post, secs. 215, 216, and cases cited; *Witcher v. Hall*, 5 B. & C. 269 (with which compare *Sanderson v. Aston* L. R. 8 Exch. 73); *United States v. Boeckler*, 21 Wall. (U. S.) 652; *Hall v. Peyser*, 126 Mass. 195; *Hibbs v. Rue*, supra; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. R. 555; *Zimmerman v. Judah*, 13 Ind. 286; *Plunkett v. Davis*, etc. Co., 84 Md. 529; *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. R. 731, 21 L. R. A. 409n; *Rowan v. Sharp's Rifle Co.*, 33 Conn. 1, and cases cited and reviewed; *Sage v. Strong*, 40 Wis. 575; *Cowderey v. Hahn*, 105 Wis. 455, 76 Am. St. R. 921. As to extension of time of payment or performance without the consent of the surety, see Post, sec. 225 et seq. See also, 16 Harv. L. Rev. 512, where the distinction is pointed out between the unauthorized material alteration of the instrument of contract by which the surety is bound, and the material variation of his risk without such physical alteration, as by some new and collateral agreement varying the time or mode of performance or the character of the risk.

4. *Madison v. Am. Sanitary Engineering Co.*, 118 Wis. 480; *Smith v. Mollieson*, 148 N. Y. 241. See also, *Grafton v. Hinkley*, 111 Wis. 48, and cases cited. Compare *Brennan v. Clark*, 29 Neb. 385. Of similar nature, obviously, are agreements which merely reduce the amount that the principal is to pay, and the surety is not discharged thereby, (*Preston v. Huntington*, 67 Mich. 139; *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. R. 193) unless the written instrument of contract is altered. See *Johnson v. May*, 76 Ind. 293; *Patterson v. McNeeley*, 16 Oh. St. 348; *Dewey v. Reed*, 10 Barb. (N. Y.) 16; *Neff v. Horner*, 63 Pa. 327, 3 Am. R. 555; Post, sec. 213.

the authority, consent or procurement of the obligee (spoliation), whether of the principal contract or of the separate undertaking of the guarantor, does not in this country affect the rights or obligations of either party, provided the terms of the original contract can be made out by evidence,⁵ and the same rule commonly applies where the alterations, though by the creditor, is purely unintentional, accidental or inadvertent.⁶ If the alteration is intentional and material, however, the surety is discharged, even though it was made honestly and under a mistaken claim or right.⁷

§ 211. By Whom and Under What Circumstances Alteration Must Be Made to Release Surety—Consent of Surety. Speaking of the contractual document by which the principal or principal and surety, or the surety only are bound, the alteration to release the surety must

5. *United States v. Spalding*, 2 Mason (U. S.) 478; *Clopton v. Elkins*, 49 Miss. 95; *Bigelow v. Stephens*, 35 Vt. 521; *Ames v. Brown*, 22 Minn. 257; *Anderson v. Bellenger*, 87 Ala. 334, 4 L. R. A. 680; *State v. Manhattan Silver Mining Co.*, 4 Nev. 318. The English rule is more strict and holds the surety discharged where the alteration is by a stranger. See *Pigot's Case*, 11 Coke, 27; *Davidson v. Cooper*, 13 M. & W. 343. Some question has been raised whether the uniform negotiable instruments act does not adopt the English rule for those instruments in this country. See N. Y. Neg. Inst. Law, sec. 124. *Master v. Miller*, 4 Term. R. 320.

6. See *Murray v. Graham*, 29 Ia. 529; *Wallace v. Tice*, 32 Oreg. 283. Many cases hold that an alteration that merely makes the instrument conform to the real intention of the parties, though made without the authority of the obligors, will not avoid it, at least in equity. *Osborn v. Hall*, 160 Ind. 153, 160 and cases cited and reviewed. *Rand. Comb. Paper* sec. 1765. *Produce Exchange Bank v. Beeberbach*, 176 Mass. 577; *McClure v. Little*, 15 Utah, 379, and cases cited in the opinion and in the note thereto in 62 Am. St. R. 963. See also *Lee v. Butler*, 167 Mass. 426, 57 Am. St. R. 466 and note. *Ryan v. First Nat. Bank*, 148 Ill. 349.

7. *Bigelow v. Stilphens*, 35 Vt. 521; *Savings Bank v. Shaffer*, 9 Neb. 1, 31 Am. R. 394; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. R. 722; *Newman v. King*, 54 Oh. St. 273, 56 Am. St. R. 705, 35 L. R. A. 471. See also *Neff v. Horner*, 63 Pa. St. 327, 3 Am. R. 555, where a note was held avoided as to the sureties by a material alteration made by the principal, though the holder was informed by the principal and believed, that the principal had authority to make it.

be made after its execution by him and without his consent. Where this is the case, the surety is not bound even though the alteration is made by the principal or his agent after its delivery to him and before its delivery to the creditor, and without knowledge on the part of the creditor that the surety did not consent;⁸ and the same result will even more certainly follow where the instrument of contract is altered after delivery to the creditor, by the creditor alone, or by the principal and creditor, without the consent of the surety.⁹

But clearly, where the surety, before or at the time an alteration is made, whether in his own contract or that of the principal, consents expressly or impliedly to be bound notwithstanding, he will remain liable with-

8. *Wood v. Steele*, 6 Wall (U. S.) 80; *Johnson v. May*, 76 Ind. 293, 300 and cases cited; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Marsh v. Griffin*, 42 Ia. 403; *Waterman v. Vose*, 43 Me. 504; *Blakey v. Johnson*, 76 Ky. 197, 26 Am. R. 254. Compare *Kieth v. Goodwin*, 31 Vt. 368; *Edwards v. Mattingly*, 21 Ky. L. 1045.

9. *Gardner v. Walsh*, 5 E. & B. 83, 85 E. C. L. 82 (overruling *Catton v. Simpson*, 8 A. & E. 136); *Martin v. Thomas*, 24 How. (U. S.) 315; *U. S. Co. v. West Va. Co.*, 81 Fed. 993; *Ziegler v. Hallahan*, 131 Fed. 205, 66 C. C. A. 1; *Glover v. Robbins*, 49 Ala. 219, 20 Am. R. 272; *Hanson v. Crowley*, 41 Ga. 303; *Newland v. Harrington*, 24 Ill. 206; *Pahman v. Taylor*, 75 Ill. 629; *Wyman v. Yeomans*, 84 Ill. 403; *Bowers v. Briggs*, 20 Ind. 139; *Franklin Co. v. Courtney*, 60 Ind. 134; *Eckert v. Louis*, 84 Ind. 99; *Hall v. McHenry*, 19 Iowa, 521, 87 Am. D. 451; *Hamilton v. Hooper*, 46 Iowa 515, 26 Am. R. 161; *Robinson v. Reed*, 46 Iowa 219; *Berryman v. Manker*, 56 Iowa 150; *Bell v. Mahin*, 69 Iowa 408; *Locknane v. Emerson*, 11 Bush (Ky.) 69; *Bracken Co. v. Daum*, 80 Ky. 388; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *People v. Brown*, 2 Doug. (Mich.) 9; *Bolton v. Fitz*, 88 Mich. 354; *State v. McGonigle*, 101 Mo. 353, 20 Am. St. R. 609-n; *State v. Findley*, 101 Mo. 368; *Haines v. Dennett*, 11 N. H. 180; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *McVean v. Scott*, 46 Barb. (N. Y.) 379; *Patterson v. McNeely*, 16 Ohio St. 348; *Wallace v. Jewell*, 21 Oh. St. 163, 8 Am. R. 48; *Harsh v. Klepper*, 28 Ohio St. 200; *Thompson v. Massie*, 41 Oh. St. 307; *Miller v. Gilleland*, 19 Pa. 119; *Neff v. Horner*, 63 Pa. 327, 3 Am. R. 555; *Fulmer v. Seitz*, 68 Pa. 237, 8 Am. R. 172; *Hartley v. Corboy*, 150 Pa. 23; *Bogarth v. Breedlove*, 39 Tex. 561.

out any new consideration;¹⁰ and this has frequently been held where his consent was given with knowledge of the facts after an alteration was made for which he might legally have claimed his discharge.¹¹

§ 212. Same—Negotiable Instruments—Negligent Execution—Execution in Blank. Generally, at common law, any party to a negotiable instrument save a subsequent indorser, is wholly released by a material alteration thereof to which he has not consented, even though it be in the hands of a holder in due course.¹² But the “Negotiable Instruments Law” in force in about forty of our states, gives a holder in due course a right to enforce such altered instrument according to its original tenor.¹³ This provision obviously applies both to indorsers and technical sureties; and clearly one who indorses such an instrument after alteration is liable to a bona fide holder for the payment of the instrument in its raised or altered form, upon his implied warranty of its genuineness. Whether a strict guarantor of a negotiable instrument subsequently materially altered would be liable for its payment according to its original terms under this provision of the statute, would seem to be doubtful in states where a guaranty upon a negotiable instrument is not itself deemed negotiable.

By many authorities if a negotiable instrument is drawn with such want of ordinary business care, as by using pencil, or by leaving blank and unprotected spaces, as to invite or facilitate its subsequent alteration, it will, if altered, be valid in its altered form in the hands of

10. *Woodcock v. Oxford & W. Ry. Co.*, 1 Drew (Ch.) 521; *McMullen v. United States*, 167 Fed. 460; *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588, 60 Am. St. R. 417.

11. *Owens v. Teague*, 3 Ind. App. 245; *Henry v. Heeb*, 114 Ind. 275, 279; *Pelton v. Prescott*, 13 Ia. 567; *Gardiner v. Harback*, 21 Ill. 128.

12. *Wood v. Steele*, 6 Wall. (U. S.) 80; *Mersman v. Werges*, 112 U. S. 141; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. R. 67; *Bradley v. Mann*, 37 Mich. 1; *Newman v. King*, 54 Oh. St. 273, 56 Am. St. R. 705 and note.

13. See *Neg. Inst. Law*, N. Y. Laws, 1897, c. 612, sec. 205.

a holder in due course, upon the ground of negligence and estoppel.¹⁴ This rule, where it prevails, has been held applicable to indorsers or other sureties upon the negligently drawn instrument.¹⁵ In a number of jurisdictions, however, the doctrine above stated is not recognized, on the ground that the wrong of the party altering the instrument and not the negligence of the signers, is the natural and proximate cause of injury to the subsequent holder in due course,¹⁶ and the non-assenting surety is released, save to the extent that his liability upon the instrument is preserved under the provisions of the Negotiable Instruments Law, already adverted to.¹⁷

In all jurisdictions, however, one who as principal or surety intentionally signs and delivers an incomplete negotiable instrument, will be liable to a bona fide payee or transferee though the blanks therein are filled up in violation of authority. The cases under this head are to be carefully distinguished from those of negligent drawing of a complete instrument.¹⁸

§ 213. Alteration to Discharge Surety Must Be Material. To discharge the surety, the alteration must be material. A mere verbal or formal change of the original contract in no wise altering its legal effect is

14. *Yocum v. Smith*, 63 Ill. 321; *Stratton v. Stone*, 15 Col. App. 237; *Rainbolt v. Eddy*, 34 Ia. 440, 11 Am. R. 152; *Blakey v. Johnson*, 76 Ky. 197, 26 Am. R. 254; *Zimmerman v. Rate*, 75 Pa. St. 188, and cases cited; *Girard v. Haddan*, 67 Pa. 82; *Scotland Co. Nat. Bank v. O'Connell*, 23 Mo. App. 165. Compare *Knoxville Nat. Bank v. Clark*, 51 Ia. 264.

15. *Isnard v. Torres & Marques*, 10 La. Ann. 103; *Hackett v. First Nat. Bank of Louisville*, 114 Ky. 193.

16. See generally on this subject, and in support of this view, *National Exchange Bank v. Lester*, 194 N. Y. 461, 21 L. R. A. (N. S.) 402, reviewing cases on both sides of this question. *Holmes v. Trumper*, 22 Mich. 427, 7 Am. R. 661; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. R. 67.

17. *Nat. Exchange Bank v. Lester*, *supra*.

18. See *National Exchange Bank v. Lester*, *supra*; *Burrows v. Klunk*, 70 Md. 451, 3 L. R. A. 576, 14 Am. St. R. 371. See *Cannon v. Grigsby*, 116 Ill. 151, 56 Am. R. 769; *Ante*, secs. 44, 47.

immaterial.¹⁹ A material alteration has been defined as one "that causes an instrument to speak a language different in legal effect from what it spoke before."²⁰ If there is such a change in the original contract as to modify the legal obligations of the principal, however, whether by alteration of its original terms, or by subsequent separate agreement, it is material and the surety is discharged.²¹

19. *Hunt v. Adams*, 6 Mass. 519; *Manufacturers Bank v. Follett*, 11 R. I. 92, 23 Am. R. 418; *Kline v. Raymond*, 70 Ind. 271; *Jackson v. Boyles*, 64 Ia. 428; *State v. Harney*, 57 Miss. 863; *Gardiner v. Harbeck*, 21 Ill. 129; *Bank v. Nordstrom*, 70 Kan. 485. See also *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. R. 313.

20. 1 Greenl. on Ev. (14th Ed.) sec. 565.

21. It is not the purpose here to consider in detail what alterations are and what are not material. This usually depends upon considerations of substantive law which will vary with the circumstances of each case. Changing the amount or time of payment or performance, adding or erasing negotiable words, adding or erasing the name of a party, changing a guaranty of payment to one of collection, changing the place of payment, adding interest or changing the rate, attaching or adding a collateral contract, etc., are all examples of material alterations. On the other hand, an alteration which changes the words of a contract without changing its legal sense, or inserts matter merely explanatory, or adds what is already implied by law, is not material. For further discussion of this matter and the citation of authorities, see *supra* note 19 and *Standard Works on Contracts* and 1 *Brandt Sur. & Guar.* (3rd Ed.) sec. 416, et seq.; 2 *Am. Lead Cas.* (5th Ed.) 432. Whether the surety is discharged by the unauthorized addition of the name of another surety is not under all circumstances uniformly determined. That the surety is discharged see 1 *Brandt, Sur. & Guar.* (3rd Ed.) sec. 418; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 82; *Bank of Limestone v. Pennick*, 5 T. B. Monr. (Ky.) 25; *Owens v. Teague*, 3 Ind. App. 245, 248 and cases cited. See also *Singleton v. McQuerry*, 85 Ky. 41. Compare *Voiles v. Green*, 43 Ind. 374; *Bowser v. Rennell*, 31 Ind. 128.

But the contrary has been held where the only alteration was the unauthorized addition of the name of a surety, whether before or after the first negotiation of the instrument. *Mersman v. Werges*, 112 U. S. 139, 142 citing *Montgomery Railroad Co. v. Hurst*, 9 Ala. 513; *Stone v. White*, 8 Gray (Mass.) 589; *McClaughey v. Smith*, 27 N. Y. 39; *Brownell v. Winnie*, 29 N. Y. 400; *Wallace v. Jewell*, 21 Oh. St. 163; *Miller v. Finley*, 26 Mich. 248, citing and distinguishing the English cases. The cases just cited go largely upon the ground that the alteration changes the liability of the surety in no material way.

§ 214. **Same—Change Beneficial to Surety.** By the almost unanimous opinion, a material alteration of or departure from the contract originally secured avoids the surety's obligation in spite of the fact that it may render it less onerous to him than before.²² Still, where the change is of the principal's contract in a particular obviously and necessarily beneficial to the surety, he is not released, as where there is a reduction merely on the amount of rent that the principal is to pay under a guaranteed lease, or in the rate of interest or amount of the principal of the debt secured. Such alterations affect him no more than would part payment by the principal, or his partial release, and may be regarded as immaterial, at least when there is no alteration of the written contract of the parties.²³

§ 215. **Alteration of Contracts for Personal Service or in Duties of Employee.** Stated in general the rule is, that where, without the consent of the surety, the terms of the contract between a private employee and his master or employer are materially changed, the surety is discharged under rules already stated.²⁴ Even though there is no alteration of the terms of the written contract between them, if there is such a change in the duties of an officer, agent or other employee of a private employer from those contemplated by the parties when the surety

and where the addition is before delivery some cases support the liability of the surety on the ground of the creditor's implied authority to get whatever additional sureties are necessary to float the paper. *Kieth v. Goodwin*, 31 Vt. 368; *Edwards v. Mattingly*, 21 Ky. L. 1045. But erasing the name of the principal or a co-surety by the act, consent or procurement of the creditor releases the sureties, for it affects their right to indemnity and contribution. *Hilliboe v. Warner*, 17 N. Dak. 594.

22. *Gardner v. Walsh*, *supra*; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Portage Co. Branch Bank v. Lane*, 8 Oh. St. 405; *Bank of Limestone v. Pennick*, *supra*; *Wier Plow Co. v. Walmsley*, 110 Ind. 242. See *Andrews v. Lawrence*, 19 J. Scott (N. S.) 768, 115 E. C. L. 768.

23. *Preston v. Huntington*, 67 Mich. 139, and cases cited, *Ante*, sec. 209, note 4.

24. *Ante*, sec. 209.

became bound as materially alters the risk, the surety will not, unless he consents, be liable for the defaults of the principal, at least with respect to his new duties. The surety has a plain right to say that his responsibility does not extend to such altered state of things.²⁵ But though new duties not covered by the original contract of suretyship are imposed upon the principal, the sureties, it seems, are not relieved from liability for breach of the duties contemplated by the original contract, unless the changed duties of the principal gave opportunity and occasion for his default in the original employment or effected a material change in its risks, or impeded or delayed the performance of the duties originally bonded.²⁶

25. *Bonar v. McDonald*, 3 H. L. Cas. 226; *Pybus v. Gibbs*, 6 El. & Bl. 902; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Bank v. Dickerson*, 41 N. J. L. 448, 32 Am. R. 237, and authorities cited; *Mumford v. Railroad Co.*, 2 Lea (Tenn.) 393, 31 Am. R. 616; *Singer Mfg. Co. v. Boyette*, 74 Ark. 600, 109 Am. St. R. 104; *Manufacturers Bank v. Dickinson*, 12 Vroom. (N. J.) 448, 451; *McCartney v. Ridgeway*, 160 Ill. 129; *First Nat. Bank v. Gerke*, 68 Md. 449, and extended note thereto in 6 Am. St. R. 458; *National Mechanics Banking Assn. v. Conkling*, 90 N. Y. 117; *Boston Hat. Mfg. Co. v. Messenger*, 2 Pick. (Mass.) 223; *Gass v. Stinson*, 2 Sumn. (U. S.) 453. See also the cases throughout this and the next three sections. Where the principal was bonded as ticket agent for a railway, having two ticket offices in the place where he was employed and these offices were consolidated and the principal given charge at an increased salary, parol evidence was held admissible to show to which office his appointment related and that the sureties were discharged. *Mumford v. Memphis etc. Co.*, 2 Lea (Tenn.) 393, 31 Am. R. 616.

26. *Skillett v. Fletcher*, L. R. 2 C. P. 469; *Saint v. Wheeler etc. Co.*, 95 Ala. 362, 36 Am. St. R. 210 and cases cited; *Shackamaxon Bank v. Yard*, 150 Pa. St. 351, 30 Am. St. R. 807; *Wallace v. Exchange Bank*, 126 Ind. 265; *St. Louis Third Nat. Bank v. Owen*, 101 Mo. 558; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Harrisburg Sav. & Loan Assn. v. U. S. Fid. & Guar. Co.*, 197 Pa. 177; *Mayor etc. v. Kelly*, 98 N. Y. 467, 50 Am. R. 699 and cases cited and reviewed; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Tradesmen's Nat. Bank v. Nat. Surety Co.*, 169 N. Y. 563; *People v. Vilas*, 36 N. Y. 459, 93 Am. D. 520; *Ryan v. Morton*, 65 Tex. 458. Compare *State ex rel. Bay v. Holman*, 96 Mo. App. 193; *Kellogg v. Scott*, 58 N. J. Eq. 344. The bond for the faithful performance of an agent's duties within certain territory will not extend to duties assigned

§ 216. **Same—Examples of Changes in Duties of Office or Employment Discharging Surety.** What changes will be deemed material under a particular bond or other undertaking for the fidelity of an officer, agent or servant must, in general, be determined from its language construed in the light of the circumstances under which it was entered into including the position then held by the principal and referred to in the bond.²⁷

In *First National Bank v. Gerke*,²⁸ G became surety on a bond given to a bank by L. The bond recited his appointment as a clerk, and was conditioned for his faithful and honest performance during the time of his employment, of all the duties and services in said bank which should "from time to time, be required of him by the board of directors of said bank, or the president or cashier thereof, or by or under their authority," and for his faithfully and honestly fulfilling "all the trusts that shall be by him, or by or under their authority, in him reposed, in his said appointment of clerk of the said bank." The clerkship to which he was appointed was that of assistant bookkeeper. His position was repeatedly changed, and finally he was made note teller and discount clerk, in which position large sums of money were collected and received by him daily, and his responsibility was greatly increased. While in this last position he committed defalcations. In an action by the bank on the bond, it was held that by the terms of the bond it was competent for the board of directors, or the

him in other and different territory. *Wheeler etc. Co. v. Brown*, 65 Wis. 99; *White etc. Co. v. Mullins*, 41 Mich. 339.

It was held where an agency contract provided that the principal should at no time order goods exceeding \$600 in amount before returns were made, that shipments in excess of that amount, worked a complete discharge as to subsequent defaults of a bond given to secure performance as per terms of such contract. *Kimball Co. v. Baker*, 62 Wis. 526. As to changes in the duties of public officers or agents see Post secs. 274, 275.

27. *Mumford v. Railroad Co.*, 2 Lea (Tenn.) 393, 31 Am. R. 616; *First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. R. 453.

28. *Supra*.

president or cashier, to impose upon L additional duties, consistent with those then pertaining to the position of bookkeeper, but not to impose duties upon him that would entirely change the nature and grade of his position in the bank, and enhance his responsibility, and thereby essentially increase the risk to the surety on his bond, and that the change in the employment of L involved a material increase of risk to the surety, who was thereby released from his obligation under the bond.²⁹ So, it has been held that non-assenting sureties on the bond of a treasurer were not liable for his defaults as manager, the duties of the two positions being essentially different.³⁰

§ 217. Same—Change in or Enlargement of Principal's Business. As a rule, however, a mere increase in or extension of the obligee's business, not involving a material change in the character of the duties imposed upon the officer, agent or employee, though it may enhance the risk of the non-consenting surety, does not discharge him. Thus that a railway company has extended its connections and thus increased the volume or amount of business transacted by a bonded ticket agent, did not discharge his sureties.³¹

§ 218. Same—Change as to Time or Mode of Accounting. Generally where the contract of the surety or the

29. Compare *Detroit Dime Sav. Bank v. Ziegler*, 49 Mich. 157, 43 Am. R. 456, where the change was merely temporary and incidental. See also, *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560; *Union Dime Sav. Inst. v. Neppert*, 3 N. Y. Supp. 797; *Union Dime Sav. Inst. v. Feltz*, 4 N. Y. Supp. 607; *Farmers etc. Bank v. U. S. Fid & Guar. Co.*, — N. Dak. — (1911), 36 L. R. A. (N. S.) 1152; in which cases the language of the bond was deemed sufficiently broad to include a material change of duties. Compare *National Mech. Banking Assn. v. Conkling*, 90 N. Y. 116 where the recitals were held to control the condition of the bond and restrict changes of duty to such only as were only temporarily imposed.

30. *Johnson v. Eaton Milling & Elevator Co.*, 18 Colo. 331.

31. *Eastern Ry. Co. v. Loring*, 138 Mass. 381. A surety for a cashier was held not discharged by an increase in the capital stock of his bank in *Leonberger v. Krueger*, 88 Mo. 160, repudiating the contra case of *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473.

contract secured provides particular mode or particular times for accounting by a private officer or agent, a material change in or departure from the contract in this respect by consent of the obligee and without the consent of the surety, will release the latter.³²

§ 219. Same—Change in Compensation of Principal or in Time or Mode of Payment. Where there is a change in the compensation of the principal or in the time or mode of payment, the law is not entirely clear. Unless it is matter of express stipulation in the surety's contract, a mere change in the amount of the principal's compensation will not, it seems, release a surety for the faithful performance of the duties of his office or employment, though made without the surety's consent;³³ nor, it seems, will an unauthorized change in the time or mode of payment have that effect unless the stipulations on that point are part of the surety's contract, or the risk to the surety is thereby increased.³⁴

32. *Singer Mfg. Co. v. Boyette*, 74 Ark. 600, 109 Am. St. R. 104; *Fidelity Mut. Life Assn. v. Dewey*, 83 Minn. 389, 54 L. R. A. 945; *Tradesman's Nat. Bank v. Nat. Surety Co.*, 169 N. Y. 563, affirming 66 N. Y. Supp. 1146, 54 App. Div. 631.

33. *Taylor v. Standard Life & Acc. Ins. Co.*, 47 Neb. 673; *Amicable Mut. Life Ins. Co. v. Sedgwick*, 110 Mass. 163, quoting *Frank v. Edwards*, 8 Exch. 214; *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. R. 210; *Harper v. Nat. Life Ins. Co.*, 17 U. S. App. 48, 56 Fed. 281, 5 C. C. A. 505; *Socialistic etc. Co. v. Hoffman*, 12 Misc. R. 440, 33 N. Y. Supp. 695; See *Domestic Sew. Mach. Co. v. Webster*, 47 Ia. 357; *Compare Am. Casualty Co. v. Green*, 75 N. Y. Supp. 407, 70 App. Div. 267. In the case of corporate fidelity bonds the statements of the obligee as to the compensation of the principal made preliminary to the issuance of the bond are in the nature of warranties, or are inserted as conditions in the body of the bond, and a material change in the compensation of the principal or the time or mode of payment will ordinarily avoid such bonds on the theory of breach of warranty or condition. See *Frost Guar. Ins.* (2nd. Ed.) sec. 79; As to changes in the compensation of public officers, see Post, sec. 274.

34. *Saint v. Wheeler*, supra; *Rogers Shoe Co. v. Coon*, 157 Mich. 549. See *Traveller's Ins. Co. v. Stiles*, 81 N. Y. Supp. 664, 82 App. D. 441.

§ 220. **Same—Change of Contract, Duty, or Employment of Risk Under Corporate Fidelity Bonds.** Practically every corporate fidelity or contract bond has reference to the risks of a definite or described office or employment, and unless it also provides that subsequent changes in the duties or employment of the risk or contract secured shall not affect liability under it, the bond is avoided by a material change in the employment of the risk, at least to the extent that the default of the risk is in the new office or employment, or the changed duties or responsibilities were contributory to a default in that originally bonded, though there is no provision in the bond forbidding change of employment without the consent of the surety.³⁵

Surety bonds, however, frequently contain express conditions on this point, a common one being that any material change in the position or employment of the risk without notice to the surety shall avoid the bond. Under a private bond such conditions were strictly enforced. Under corporate fidelity bonds there is apparently somewhat less strictness in the decisions, though the general principles involved are the same.³⁶ But even where the surety company's bond provided that the employee, holding a few shares of stock, and described in the bond as assistant cashier, could perform other duties than those mentioned in the bond without notice to the company, it was held that it was not liable for subsequent defaults where, without notice to it, the

35. *First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. R. 453; *Tradesman's Nat. Bank v. Nat. Sur. Co.*, 169 N. Y. 563, (citing *Page v. Krekey*, 137 N. Y. 307; *Smith v. Molleson*, 148 N. Y. 241); *Sun Life Ins. Co. v. U. S. Fid. & Guar. Co.*, 130 N. Car. 129; *Kellogg v. Am. Ins. Co.*, 62 N. J. Eq 344; *Fairbanks Co. v. Am. Bond. & Tr. Co.*, 97 Mo. App. 205; *Bauchard Co. v. Fid. & Cas. Co.*, 21 Pa. Supr. Ct. 370; See *Farmers etc. Bank v. U. S. Fid. & Guar. Co.*, — So. Dak. — (1911), 36 L. R. A. (N. S.) 1152; Ante, sec. 209 and cases throughout this section. As to change in the duties of public officers, see, Post, sec. 274, 275.

36. See *Daly v. Old*, 35 Utah, 74; 28 L. R. A. (N. S.) 463; and note.

principal became cashier and acquired ownership of a majority of the stock and a controlling interest in the bank.³⁷

§ 221. Alteration of Contracts for Particular Works. Contracts for the construction of buildings or for other particular works are no exception to the rules already laid down, and any material change therein or departure therefrom with the consent of the owner and without the consent of the surety will discharge him,³⁸ unless, or to the extent at least, that his suretyship is for the protection of laborers or material men rather than to insure the proper and prompt performance of the contract itself.³⁹ Perhaps the most common application of the general rule to contracts for particular works is where payment is made to the contractor in advance of the times stipulated therefor in the contract. Though such advance payments may sometimes enable the contractor more readily to perform, the courts look to their general tendency to take away the chief incentive to prompt and complete performance on his part, rather than to any actual injury that the surety may have suffered in the particular case. Furthermore, the surety has a right to stand on the strict terms of his undertaking and to be the sole judge of what is to his benefit or not.⁴⁰ But small per-

37. *Farmers & Merch. St. Bank v. Verdon*, — So. Dak. — (1911), 36 L. R. A. (N. S.) 1152. To similar effect see *Fid. & Cas. Co. v. Gate City Nat. Bank*, 97 Ga. 634; 33 L. R. A. 821, 52 Am. St. R. 440; *Champion etc. Co. v. Am. Bond. & Tr. Co.*, 115 Ky. 863, 103 Am. St. R. 356.

38. *Andrews v. Lawrence*, 19 C. B. N. S. 768, 115 E. C. L. 768; *Calvert v. London Dock Co.*, 2 Keen, 638; *Zimmerman v. Judah*, 13 Ind. 286; *McConnell v. Poor*, 113 Ia. 133, 52 L. R. A. 312; *Stephens v. Elver*, 101 Wis. 392, and cases cited and discussed, and cases throughout this section.

39. Ante, sec. 116; *Conn v. State*, 125 Ind. 514; *Stiffes v. Lemke*, 40 Minn. 27; *School Dist. of Kans. City v. Livers*, 147 Mo. 580; *Doll v. Crume*, 41 Neb. 655; *Griffith v. Rundle*, 23 Wash. 453, 55 L. R. A. 381; *People v. Banhagel*, 151 Mich. 40.

40. *Calvert v. London Dock Co.*, 2 Keen. 638; *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550; *Prairie Bank v. U. S.*, 164 U. S. 227 and cases cited and discussed; *Taylor v. Jeter*, 23 Mo. 244;

sonal loans by the owner to the contractor in advance of installments falling due have been held not to release the surety on the contractor's bond.⁴¹ It has been held that the surety will be discharged, at least *pro tanto*, where payments are made without the certificate of the architect or engineer as required by the contract.⁴² And where it was part of the obligee's undertaking to insure the premises in course of construction, a breach of his contract in this respect discharged the surety absolutely,

Wier Plow Co. v. Walmsley, 110 Ind. 242; *Finney v. Condon*, 86 Ill. 78; *Chester v. Leonard*, 68 Conn. 495; *Cowdrey v. Hahn*, 105 Wis. 455, 76 Am. St. R. 921; *Bragg v. Shain*, 49 Cal. 131; *Ryan v. Morton*, 65 Tex. 258; *Truckee Lodge v. Wood*, 14 Nev. 293; *Morgan Co. Commissioners v. Branham*, 57 Fed. R. 179; *Simonson v. Grant*, 36 Minn. 439; *Smith v. Mollieson*, 148 N. Y. 241; *Long v. Am. Surety Co.*, — S. Dak. — (1912) and numerous authorities cited; *First Nat. Bank v. Fid. & Dep. Co.*, 145 Ala. 335, 5 L. R. A. (N. S.) 418 and note. See *Hand Mfg. Co v. Marks*, 136 Oreg. 523. That the surety will be released by the owner's failure to pay the contractor weekly as provided by the contract, see *Carson O. H. Assn. v. Muller*, 16 Nev. 327. It has even been held that the surety will be discharged by increasing the compensation of the contractor *Warden v. Ryan*, 37 Mo. App. 466; or by releasing a joint contractor on a building contract without consent of the surety. *Friendly v. Nat. Sur. Co.*, 46 Wash. 71, 10 L. R. A. (N. S.) 1160. A guarantor of payment within 60 days for lumber to be delivered "free on board cars" for use by a contractor almost wholly without means of his own was discharged by the seller requiring the contractor to pay freight amounting to 7 per cent of the price, though such payment was credited upon the price and thus reduced the debt guaranteed, since the requirement tended to delay completion of the work and impair the contractor's ability to meet his debts. *Chandler Lumber Co. v. Radke*, 138 Wis. 495.

41. *Stephens v. Elver*, 101 Wis. 392, distinguished in *Cowdrey v. Hahn*, *supra*; *Museum of Fine Arts v. Am. Bonding Co.*, 211 Mass. 124.

42. *Fidelity & Dep. Co. v. Agnew*, 152 Fed. 955; *Brennan v. Clark*, 29 Neb. 385. But see *Smith v. Mollieson*, 148 N. Y. 241, and *Ante*, sec. 209 and cases in note 4.

Where the contract provided for production of receipts in full for labor and material before payment to the contractor, payment to him without their production released the non-consenting surety. *Electric Appliance Co. v. Fidelity & Guar. Co.*, 110 Wis. 434, 53 L. R. A. 609. The contrary was held where the principal in good faith paid on receipts forged by the contractor, who was bound by the very contract guaranteed to present receipts from laborers and ma-

and not merely to the extent that his liability would have been lessened had the insurance been effected.⁴³

§ 222. Same—Contract Insurance Bonds. Contract insurance so called is an undertaking in the form of a bond, whereby the surety company, for a premium, agrees to indemnify the obligee to a designated amount, against loss or damage to the latter through failure of the principal to perform a contract of a non-fiduciary character.⁴⁴ So far as these bonds insure the performance of contracts for the erection of buildings or the execution of other particular works the general principles as to material departures from the terms and conditions originally agreed upon prevail in the absence of express stipulations in the bond.⁴⁵ If the contract itself provides in general terms that changes may be made in the contract secured without the consent of the surety, changes of such a nature as do not materially or radically alter the general plan and character of the work as distinguished from those that do, do not relieve the surety.⁴⁶ If the bond provides that changes in the

terialmen. *Allen v. Eneroth*, 118 Minn. 476, (1912). Where, by the terms of the guaranteed contract, payments are to be made from time to time on the certificate or estimate of the architect, the surety cannot defeat recovery because of overpayments made in good faith on such estimates. They are conclusive as to him. *Finney v. Condon*, 86 Ill. 78.

43. *Watts v. Shuttleworth*, 5 H. & N. 235, 7 H. & N. 355.

44. *Chesapeake Transit Co. v. Walker & Son*, 150 Fed. 850; See *Ansklund v. Aetna Indemnity Co.*, 47 Oreg. 10; *Union Tr. Co. v. Citizens Tr. & Sur. Co.*, 185 Pa. St. 217. As to assignability of such bonds see *Ante*, sec. 114.

45. *House v. Am. Sur. Co.*, 21 Tex. Civ. App. 590; *Bund's Est. v. Fid. & Dep. Co.*, 96 Md. 467; *Kracht v. Empire State Sur. Co.*, 162 Wash. 339; *Fruendly v. Nat. Sur. Co.*, 46 Wash. 71, 10 L. R. A. (N. S.) 1160. Contra as to circumstantial or immaterial variations. *Rule v. Anderson*, 160 Mo. App. 347. See also *Michigan Steamship Co. v. Am. Bonding Co.*, 104 N. Y. App. Div. 347, 93 N. Y. Supp. 805.

46. *Filbert v. City of Philadelphia*, Phil. (Pa.) 37 Atl. 546; *Am. Sur. Co. v. San Antonio L. & Tr. Co.*, (Tex. Civ. App.) 98 S. W. 387. In *House v. Am. Sur. Co.*, 21 Tex. Civ. App. 590 authorizing alterations in general terms, the addition of a fourth story to what the bond described as a three-story building released the surety.

plans and specifications shall not be made save upon the written order of the architect or engineer, material changes made without such order will probably release the surety, provided damage to him results.⁴⁷

§ 223. Alteration of Lease as Discharge of Surety. A guarantor or surety bound for rent or for the performance of other covenants of a lease is discharged from future liability by a material alteration of the terms and conditions of letting unless he consents to the change.⁴⁸ For rent already accrued, or breaches already committed, the surety remains liable.⁴⁹ Where the surety is bound upon a lease for a year, he is not liable for rent accruing thereafter, though the tenant holds over or the lease is renewed, unless the suretyship is meant to cover such renewal or holding over.⁵⁰

See also *Enterprise Hotel Co. v. Book*, 48 Oreg. 58; *U. S. Fid. & Guar. Co. v. U. S.*, 194 Fed. 611.

47. See *Cowles v. U. S. Fid. etc. Co.*, 32 Wash. 120 holding that such a provision in the principal contract is primarily for the benefit of the owner and contractor and may be waived by them at least to the extent that such waiver does not involve a change in the terms of the contract or work injury to the surety. The court cites and approves *Smith v. Mollieson*, 148 N. Y. 241.

48. *Ziegler v. Hallahan*, 126 Fed. 788; *White v. Walker*, 31 Ill. 422; *Nichols v. Palmer*, 48 Wis. 110; See *Holmes v. Brunskill*, L. R. 3 Q. B. D. 495. But the assignment of a lease by the lessee does not discharge the surety from liability for breach of its express covenants for the plain reason that it in no wise alters the liability of the original lessee for their performance. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; *Way v. Reed*, 6 Allen (Mass.) 364.

49. *Kingsbury v. Westfall*, 61 N. Y. 356; A mere reduction of the rent without alteration of the lease however does not release the surety, under rules already stated. Ante, sec. 209, note 4. See *Preston v. Huntington*, 67 Mich. 139; *Dodd v. Vucovitch*, 38 Mont. 188.

50. See *Deblois v. Earle*, 7 R. I. 26; *Rice v. Loomis*, 139 Mass. 302; *Defan v. Wright*, 25 Wend. (N. Y.) 636. As to the liability of a surety for a tenant where there is a covenant to renew, see Ante, sec. 102.

CHAPTER XXII.

RELEASE OF SURETY BY INDULGENCE TO PRINCIPAL—LACHES—EXTENSION OF TIME WITHOUT CONSENT OF SURETY.

§ 224. **Mere Indulgence to Principal or Forbearance or Inaction of Creditor Usually No Discharge of Surety.** Mere voluntary forbearance of the creditor or his mere passive indulgence in favor of the principal, however long continued, will not, in general, discharge either a technical surety¹ or an absolute guarantor of payment or performance² where such forbearance constitutes no violation of special contract terms,³ or involves no fraud, collusion or breach of good faith. The reason usually given for this rule is that a surety or absolute guarantor is in default the moment his principal is in default and may pay at any time and pursue his remedies against the principal, and be subrogated to the rights, remedies and securities of the creditor against him, and that no duty of active diligence is imposed upon the creditor by the terms of the contract of the strict surety or absolute guarantor. Upon this ground mere forbearance on the part of the creditor to sue the principal will not release the surety⁴ unless the latter has by notice under statute,⁵

1. Ante, secs. 3, 193; *Wright v. Simpson*, 6 Ves. 734; *McLemore v. Powell*, 12 Wheat (U. S.) 554; *Greenway v. Orthwein Grain Co.*, 85 Fed. 636, 29 C. C. A. 330; *Townsend v. Riddle*, 2 N. H. 448; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581, 13 Am. D. 458; *Ray v. Brenner*, 12 Kan. 105; *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 23 Am. St. R. 39; *Taylor v. Lohman*, 74 Ind. 418; *Michigan State Ins. Co. v. Soule*, 51 Mich. 312; *Alley v. Hopkins*, 98 Ky. 668, 56 Am. St. R. 382; *Freaner v. Yingling*, 37 Md. 491; *Harris v. Newell*, 42 Wis. 687, 691; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. R. 281 and cases cited and reviewed and cases throughout this section.

2. Ante, sec. 3; *Penny v. Crane Bros. Mfg. Co.*, 80 Ill. 244.

3. See *Walker v. Goldsmith*, 7 Oreg. 161.

4. *Eyre v. Everett*, 2 Russ. 389; *Davis v. Huggins*, 3 N. H. 231; *Cochran v. Orr*, 94 Ind. 433, and cases cited Ante, sec. 172 note 2.

5. Post, secs. 172, 173.

or by suit in equity⁶ taken proper steps to rouse the creditor into activity against the principal. Neither, ordinarily, is the creditor bound to subject to the debt collateral securities in his hands, for the surety may pay and enforce them for his own indemnity by virtue of his right to subrogation.⁷ Similarly, a surety for rent is not released by the failure of the creditor to destrain or to assert his landlord's lien,⁸ unless, perhaps, neglect to do so operates as an abandonment of such lien altogether;⁹ nor is a surety released by the failure of the creditor to present his claim in bankruptcy or insolvency proceedings against the principal,¹⁰ or against his estate in probate, in the absence of statute requiring him to do so,¹¹ or to administer on his estate in case of death,¹² or to take steps to prevent the principal from wasting or removing his property.¹³ As further illustrating the general rule that the creditor owes the surety no duty of active diligence, he is not bound to take additional security from the principal even though it is offered

6. Post, sec. 176; *Harris v. Newell*, 42 Wis. 681, 691 and authorities cited.

7. Ante, sec. 133 et seq; Ante, sec. 179; *Freaner v. Yingling*, 37 Md. 492. See also Post, sec. 179.

8. *Hall v. Hoxsey*, 84 Ill. 616; *Ewing v. Williams*, (Ky. 1897) 39 S. W. 843; *Miller v. White*, 25 S. Car. 235; *Hubbard v. Pace*, 34 Ark. 80.

9. *Mingres v. Daugherty*, 87 Ia. 56, 43 Am. St. R. 354.

10. Ante, sec. 195; *Hickham v. Hollingworth*, 17 Mo. 475; *Clopton v. Spratt*, 52 Miss. 251; *Levey v. Wagner*, 29 Tex. Civ. App. 98; *Schott v. Youree*, 142 Ill. 233; *St. Louis Co. v. Security Bank*, 75 Minn. 174; *Dye v. Dye*, 21 Oh. St. 86, 8 Am. R. 40; *Wilson v. White*, 82 Ark. 407. Compare *McCullom v. Hinckley*, 9 Vt. 143.

11. *Ray v. Brenner*, 12 Kan. 105; *Yexera v. Ruthraff*, 19 N. Dak. 13, 25 L. R. A. (N. S.) 139 and note. See Rev. Stat. Ill. (1909) p. 2208, section 3.

As to the related question of the effect of the creditor's delay until the claim against the principal is barred by the statutes of limitations or non-claim, see Post, sec. 204.

12. *Brown v. Flanders*, 80 Ga. 209; *Grindol v. Rudy*, 14 Ill. App. 439.

13. *Goodacre v. Skinner*, 47 Kan. 575.

him;¹⁴ though if he negligently or wilfully impairs securities actually taken, whether received when the surety became bound or subsequently, the surety is ordinarily absolved to the extent of their value at least.¹⁵ So the creditor may discontinue an action already brought against the principal without releasing the surety provided no lien or security is thereby lost or impaired.¹⁶ Furthermore, the surety is not released in the absence of fraud or special agreement by the mere neglect of the obligee to supervise the principal so as to guard against default.¹⁷

If the creditor holds a chattel mortgage from the principal, he does not lose his right of recourse against the surety by failure to foreclose or to take possession of the mortgaged chattels.¹⁸

§ 225. Extension of Time to Principal as Discharge of Surety—In General. But any binding agreement between the creditor or obligee and the principal, extending the time of payment or performance for any period,

14. *City Bank v. Young*, 43 N. H. 457; *Morrison v. Citizens Nat. Bank*, 65 N. H. 253, 23 Am. St. R. 39; *Folk v. Cruikshanks*, 4 Rich. L. (S. Car.) 243; *Marrcon Co. v. Moffert*, 15 Mo. 604.

15. Ante, sec. 147, Post, secs. 245 et seq. See *Clopton v. Spratt*, 52 Miss. 251, and authorities cited and discussed. Whether his failure to record a mortgage whereby the security is lost releases the surety under this last principle, or whether it falls under the principle of mere indulgence or inaction, and hence works no discharge, is discussed elsewhere. Post, sec. 248.

16. 2 Am. Lead. Cas. (Hare & Wal.) 390, 394; *Mut. Life Ins. Co. v. Davies*, 56 How. Pr. (N. Y.) 440; *Owen v. State*, 25 Ind. 371; *Concord Bank v. Rogers*, 16 N. H. 9; *Barney v. Clark*, 46 N. H. 614; *Summerville v. Marbury's Admr.*, 7 Gill & J. (Md.) 275. Compare *Tyler v. Davis*, 63 Miss. 345. The same principle applies to a mere failure to issue execution on a judgment already obtained. *U. S. v. Simpson*, 3 Pen. & Watts, (Pa.) 439; *Buckalew v. Smith*, 44 Ala. 638; *Humphrey v. Hitt*, 6 Gratt. (Va.) 509, 52 Am. D. 133; *Knight v. Charter*, 22 W. Va. 222. See Post, sec. 250 as to liens acquired by execution or attachment, or the abandonment of a levy already made.

17. Ante, secs. 207, 208.

18. *Freaner v. Yingling*, 37 Md. 491. But see *Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274,

however short, entered into without the consent of the surety, with knowledge by the creditor of the suretyship relation, will release the surety unless, as we shall presently see, the creditor reserves his rights against the surety or the surety is fully indemnified. This rule seems now to be universal.¹⁹ The reasons for it are not far to seek. Not only does the extension constitute a material alteration or variation of the contract so that it is no longer the surety's undertaking, but it deprives the surety of the right to pay the debt when it is due according to the original contract or at any time thereafter and to thereupon enforce his rights of indemnity and subrogation.²⁰

19. 1 Brandt on Sur. & Guar. (3rd Ed.) sec. 376; *Stewart v. Parker*, 55 Ga. 656; *Benson v. Phipps*, 87 Tex. 578, 47 Am. St. R. 128; *Jenness v. Cutler*, 12 Kan. 513 and cases cited; *Post v. Losey*, Ill. Ind. 75, 60 Am. R. 677, and cases throughout this section. That an extension to one joint principal releases the sureties see *Warburton v. Ralph*, 9 Wash. 537.

20. *Reese v. Berrington*, 2 Ves. Jr. 540; Brandt, *supra*; *Samuel v. Howarth*, 3 Merivale, 272, with which compare the earlier case of *Davey v. Pendergrass*, 5 Barn. & Ald. 187; *Ewen v. Lancaster*, 6 B. & S. 571. *Oriental, etc., Co. v. Overend*, L. R. 7 Ch. 142; *Pooley v. Herradine*, 7 El. & B. 431; *Forbes v. Sheppard*, 98 N. Car. 111; *Benson v. Phipps*, *supra*; *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. R. 861; *Brown v. Mason*, 55 App. Div. 395, 66 N. Y. Supp. 917, affirmed 170 N. Y. 584; *Post v. Losey*, *supra*; *Leitenhauser v. Baumeister*, 47 Minn. 151; 28 Am. St. R. 336; *Ide v. Churchill*, 14 Oh. St. 383; The principles above stated are recognized in practically all of the cases cited in this chapter.

In spite of its almost obvious justice, the doctrine that the giving of time to the principal discharges the surety seems to have originated in equity in comparatively modern times. *Nesbit v. Smith*, 2 Bro. C. C. 579 (1789) is said to have been the earliest application of the doctrine. This case was followed by *Reese v. Berrington*, *supra*, (1795); *Boultree v. Stubbs*, 18 Ves. 20 (1810) *Bournaker v. Moore*, 3 Price 214 (1816) *Eyre v. Bartrop*, 3 Mad. 221 (1818.) See *Devers v. Ross*, 10 Gratt. (Va.) 252, 60 Am. D. 331; and *Stirewalt v. Parker*, *supra*, showing the purely equitable nature of the defense as originally admitted in some states, and as it exists in a few of them now. See also *Manley v. Boycott*, 3 El. & Bl. 46; *Samuell v. Howarth*, 3 Merivale, 272; *Spriggs v. Bank*, 10 Pet. (U. S.) 257; *Yates v. Donaldson*, 5 Md. 389, 61 Am. D. 283; *Anthony v. Fritz*, 45 N. J. 1, and cases cited. *Farmer's Bank v. Horsey*, 1 Harr. (Del.) 514 holding that if the principal and surety are joint makers or

It makes no difference with the operation of this rule whether the extension of time was granted before or after the maturity of the debt, provided the agreement therefor is sufficient to tie up the hands of the creditor as against the principal.²¹

It is immaterial that the extension of time to the principal works no injury to the surety or that it may even be beneficial to him, "for it is the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."²²

covenantors extension to the principal affords the surety no defense at common law, though the creditor knew of the suretyship. See also *Wittner v. Ellison*, 72 Ill. 301. Generally in this country however, the defense of extension of time without consent of the surety is available under these circumstances, both at law and in equity, particularly under the codes. *Scott v. Scruggs*, 60 Fed. R. 721; *Capital Bank v. Real*, 62 Cal. 419; *Buck v. Smiley*, 64 Ind. 431; *Arms v. Beitman*, 73 Ind. 85; *Kales v. Hise*, 79 Ind. 301; *Sample v. Cochran*, 84 Ind. 594; *Lanman v. Nicholas*, 15 Iowa 161; *Wendling v. Taylor*, 57 Iowa 354; *Lambert v. Shefler*, 71 Iowa 463; *Calloway v. Snapp*, 78 Ky. 561; *Andrews v. Marrett*, 58 Me. 539; *Guild v. Butler*, 127 Mass. 386; *German Association v. Helmrick*, 57 Mo. 100; *Stillwell v. Laron*, 69 Mo. 539, 33 Am. R. 517; *Welfare v. Thompson*, 83 N. Car. 276; *Murray v. Marshall*, 94 N. Y. 611; *Calvert v. Good*, 95 Pa. 65; *First Bank v. Skidmore* (Tex. App.), 30 S. W. R. 564; *Irvine v. Adams*, 48 Wis. 468, 33 Am. R. 817; *Moulton v. Posten*, 52 Wis. 169. See the next section and Post, sec. 233 et seq.

21. *Turrell v. Boynton*, 23 Vt. 142; *Pomeroy v. Tanner*, 70 N. Y. 547; *Veazie v. Carr*, 3 Allen (Mass.) 14; Neither does it matter that the claim of the creditor has been reduced to judgment, whether such judgment be against the surety or principal alone or against the surety and principal jointly. The form and not the substance of the relation and obligation of the parties alone is changed. *Ward v. Johnson*, 6 Munf. (Va.) 6, 8 Am. D. 729; *Ide v. Churchill*, 14 Oh. St. 372; *Ragsdale v. Gossett*, 70 Tenn. 729; *Smith v. Rice*, 27 Mo. 505, 72 Am. D. 281.

22. *Lord Loughborough* in *Reese v. Berrington*, 2 Ves. Jr. 540. See also *Boultree v. Stubbs*, 18 Ves. 19 per Lord Eldon; *Dey v. Martin*, 78 Va. 1; *Warburton v. Ralph*, 9 Wash. 71.

Again it has been said, "Every contract is composed of the material terms and stipulations embraced in it, and among those none is more important than the time of performance. It follows that whatever changes any of these material terms and stipulations, so as to destroy the identity of the obligation to which the surety acceded, necessarily discharges him from liability. An engagement to pay money in six months, is not the same as one to pay it in twelve months; and if the creditor, by a valid agreement with the debtor, extends the time of performance from the shorter to the longer period, he supersedes the old obligation by the new, and cannot enforce payment until the longer period has elapsed. If the surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal, and if he is sued upon the substituted agreement, he is entitled, both at law and in equity, to make the short and conclusive answer, *non hoec in foedera veni*. But such an agreement between the principal parties is perfectly valid and legal, and until some method can be devised for depriving the principal of the benefits of a valid agreement, or of binding the surety to an agreement to which he never acceded (a work hitherto thought not to be within the powers of either courts or legislatures), the discharge of the latter must ensue. I am very well aware, that this charge has been often thought to rest upon the injurious consequences of such arrangements, either real or possible, upon the rights and interests of the surety, and undoubtedly in most cases, such would be their necessary tendency. But if it rested upon this ground alone, it would be very difficult upon equitable principles to extend the relief beyond the actual injury; while it is universally agreed that they work a total discharge, and extend to cases where no possible injury to the surety could have ensued."²³

23. Ranney, J., in *Ide v. Churchill*, 14 Oh. St. 372, 383, 384. See also *Post v. Losey*, 111 Ind. 75, 60 Am. R. 677 and authorities cited.

§ 226. Does Unauthorized Extension of Time Release Surety Maker or Co-Maker Under the Negotiable Instruments Law? The uniform negotiable instruments law in force in about forty jurisdictions provides²⁴ that "the person primarily liable on the instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other persons are secondarily liable. Other sections of this same act,²⁵ provide what acts or circumstances shall discharge persons primarily and secondarily liable respectively. An unauthorized extension of time is among the enumerated matters discharging a party secondarily liable, but not among those discharging a party primarily liable. In this condition of the statute, it has recently been held that one who signs a negotiable instrument as co-maker, though a surety in fact as against his co-maker and known to be such by the holder, is not released by an authorized extension of time under the peculiar wording of the statute provisions just referred to, pursuant to the maxim *expressio unius est exclusio alterius*, as he is a person primarily liable as one "who by the terms of the instrument is absolutely required to pay the same,"²⁶ and it has been held to make no difference that his suretyship character appears on the face of the

English v. Darley, 2 B. & P. 61. If however, the agreement between principal and creditor accelerates rather than retards the remedy, it will not release the surety. In Hulme v. Coles, 2 Sim. 12, a cognovit was taken by the creditor from the principal with a stipulation not to enter judgment thereon until Aug. 1. Judgment independent of this could not have been entered in the usual course until much later, Held no discharge. To the same effect see Fales v. McDonald, 32 R. I. 406, 414 and cases cited.

24. See the New York act, sec. 3.

25. Secs. 200, 201 of the New York act.

26. Richards v. Market Exchange Bank, 81 Oh. St. 348, 26 L. R. A. (N. S.) 90; Northern State Bank v. Bellamy, 19 S. Dak. 509, 31 L. R. A. (N. S.) 149; Vanderford v. Farmers,' etc. Nat. Bank, 105 Md. 164, 10 L. R. A. (N. S.) 129; Wolstenholme v. Smith, 34 Utah 300; Bradley Engineering Co. v. Heyburn, 56 Wash. 628, 134 Am. St. R. 127.

instrument, as where the word "surety" is written after his signature.²⁷

Upon the above reasoning a sole accommodation maker of a negotiable note (and the same would be true of the accommodation acceptor of a bill) has been held not to be released by an unauthorized extension of time in favor of the party accommodated. He is primarily liable by the terms of the instrument.²⁸ It may perhaps be doubted whether the framers of the Act intended any such innovations upon the law as to suretyship on negotiable paper as these decisions embody or imply, or whether the conclusions above reached are sound. A party primarily liable is discharged by certain enumerated acts and also by "any other act that will discharge a simple contract for the payment of money." What acts will discharge a simple contract for the payment of money would seem to depend upon the character of the promise and the situation of the parties, and an unauthorized extension of time is always held a circumstance that will discharge a known surety's simple contract for such payment, at least where the fact of suretyship appears on the face of the contract or was otherwise known to the creditor at the time he became such. If the reasoning of these cases be sound, it would appear that the release, misapplication or negligent waste of collaterals held of the principal debtor would not release the surety maker or co-maker as it would a surety on a non-negotiable contract or a technical guarantor. This, however, has been met by the suggestion that the

27. *Cellers v. Meachem*, 49 Or. 186, 10 L. R. A. (N. S.) 133. But this rule has been held not to apply to a technical guarantor, though his guaranty is absolute, (i. e. of payment) on the ground that his contract, being a separate and independent one and his liability, being contingent upon the default of the maker, he is only secondarily liable. *Northern State Bank v. Bellamy*, *supra*.

28. *National Citizens Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422, affirmed on another point in 178 N. Y. 464, where the important and doubtful character of the question considered below is noted. *Bigelow, Bills, Notes and Checks* (2nd Ed.) 185. See *Rouse v. Wooten*, 140 N. Car. 557, 111 Am. St. R. 875.

act was probably designed to cut off suretyship rights as against the holder by one signing on the face of the paper, and that if a signer desires such rights he should indorse or else make a distinct contract of guaranty;²⁹ and it may be further suggested that, as it was rule in a number of jurisdictions prior to the act, that knowledge by the holder, even when he took the paper, that it was made or accepted for accommodation would in no wise prevent him from holding the maker or acceptor as primary debtors,³⁰ it is entirely possible that the framers of the act had this condition of affairs in mind, together with the lament of Gibbs J. in *Kerrison v. Cooke*³¹ who said: "I am sorry that the term 'accommodation bill' ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiable securities."

§ 227. Agreement Extending Time to Principal Must be Binding—Forbearance Under Void Agreement Does Not Release Surety. As stated at the outset, however, the agreement extending the time of payment or performance must be valid and enforceable by the principal in order to affect the surety's liability, and if it be void for

29. *Vanderford v. Farmers etc. Bank*, 105 Md. 564. See also *Bradley Engine & Mfg. Co. v. Heyburn*, 56 Wash. 628; *Richards v. Market Exchange Nat. Bank*, 81 Oh. St. 381, 26 L. R. A. (N. S.) 90.

30. *Farmers' Bank v. Rathbone*, 26 Vt. 19, 58 Am. D. 200; *Montgomery Bank v. Walker*, 9 Serg. & R. (Pa.) 229, 11 Am. D. 709; 12 Id. 382; *White v. Hopkins*, 3 Watts & S. (Pa.) 99, 37 Am. D. 542; *Lewis v. Hunchman*, 2 Barr (Pa.) 416; *Stephenes v. Mongahela*, 88 Pa. St. 157; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. D. 322; *Church v. Barlow*, 9 Pick. (Mass.) 547, 551; *In re Babcock*, 3 Story C. C. 393 and authorities cited; *Sandford v. Lambert*, 2 Blackf. (Ind.) 137, 18 Am. D. 149; *Clapper v. Union Bank*, 7 Har. & J. (Del.) 92. Contra, *Laxton v. Peat*, 2 Camp. 185; *Hall v. Capital Bank*, 71 Ga. 715; *Meggett v. Baum*, 57 Miss. 22; *Westervelt v. French*, 33 N. J. Eq. 451; *American Bank v. Baker*, 4 Met. (Mass.) 164; *Guild v. Butler*, 127 Mass. 386; *Canadian Bank v. Coumbe*, 47 Mich. 358.

31. 3 Camp 362 (1813).

want of consideration³² or for illegality,³³ or is voidable because of fraud or duress practiced upon the creditor,³⁴ or if for any other cause it is insufficient to stay the hand of the creditor as against the principal debtor, the surety is not released,³⁵ even though the creditor actually forbears, for, as we have seen, mere inactivity or voluntary forbearance against the principal does not release a technical surety or an absolute guarantor.³⁶ Clearly the surety is not released so long as the agreement for extension is executory or conditional, so that it does not presently operate to tie up the hands of the creditor,³⁷ nor where it is made between the creditor and a stranger;³⁸ and as the common law rule requires an instrument under seal to be discharged by matter of equal dignity, it has been held that a surety for a specialty

32. Post, secs. 233, et seq; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. R. 111.

33. As to the payment, or an agreement to pay, usurious interest as a consideration, See Post, sec. 235.

34. *McDougal v. Walling*, 15 Wash. 668, 55 Am. St. R. 907, 37 L. R. A. 111; *Bangs v. Strong*, 10 Paige (N. Y.) 11; *Hubbard v. Hart*, 71 Ia. 668; *Kirby v. Landis*, 54 Ia. 150; *Allen v. Sharpe*, 37 Ind. 67, 10 Am. R. 80. The surety is released however, if the creditor waives the fraud and ratifies the transaction without consent of the surety. *Kirby v. Landis*, supra.

35. So held where the remedy was plainly accelerated. *Hulme v. Cowles*, 2 Sim. 12; *Gardner v. Van Norstrand*, 13 Wis. 543; *McKenzie v. Ward*, 58 N. Y. 541, 17 Am. R. 281; *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129; *Smith v. Mason*, 44 Neb. 610. See also *Pendergast v. Devey*, 6 Madd. 124.

That an agreement for extension of time, void under the statute of frauds, will not release the surety see, *Philpot v. Briant*, 4 Bing. 717; *Barry v. Pullen*, 69 Me. 101, 31 Am. R. 248; *Agee v. Steele*, 3 Ala. 948; An extension of time granted by an agent or attorney will not release the security where it was void as to the principal for want of authority in such agent. See *Hall v. Presnell*, 157 N. Car. 290, 39 L. R. A. (N. S.) 62 and note.

36. Ante, sec. 224; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. R. 111, and authorities cited.

37. *Miller v. Dobschuetz*, 89 Ill. 176; *Miller v. Hatch*, 72 Me. 481, 39 Am. R. 346; *Clifton v. Litchfield*, 106 Mass. 34; *Blake v. Blake*, 110 Mass. 202.

38. *Frazer v. Jordan*, 8 El. & Bl. 303; *Clark v. Birley* 41 Ch. Div. 422.

undertaking is not released at law by a parol extension to his principal,³⁹ though equity would interfere in such cases if substantial justice required, and the defense in England since the Judicature Act is now available at law, and the same is quite generally true under the codes in this country.⁴⁰

§ 228. Same—Where Creditor Reserves His Rights Against the Surety. Where the creditor at the time of granting an extension of time to the principal expressly reserves his rights against the surety, the latter is not released though he does not consent to such extension, and the same doctrine applies where there is an absolute release, which, in such cases, is commonly construed as a covenant not to sue.⁴¹ The reasoning upon which this rule is based is that the reservation by the principal of his rights against the surety amounts to a reservation to the surety of all his rights against the principal debtor, if notwithstanding the extension of time to, or the release of, the principal, the creditor should see fit to exact performance by the surety.⁴² It follows, of course, that the principal may derive little or no benefit from such an extension or release, for the surety may be called upon to pay, and, having paid, may turn immediately upon the principal for indemnity.⁴³ The same rule applies where there is an absolute release of the principal,

39. *Davey v. Pendergrass*, 5 Barn. & Ald. 187; Post, sec. 237.

40. See Halsb Laws of England, Vol. 15, p. 553 note p. 1 Brandt Sur. & Guar. sec. 411; *Reese v. Berrington*, 2 Ves. 540; Post, sec. 237.

41. Post, sec. 242; *Ex parte Gifford*, 6 Ves. 805; *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316 and authorities cited.

42. 1 Brandt. Sur. & Guar. (3rd Ed.) sec. Ex Parte Glendenning 1 Buck. 517; *Oriental, etc. Co. v. Overend*, L. R. 7 Ch. 142; *Salmon v. Claggett*, 3 Bland's Ch. (Md.) 125; *Sohier v. Loring*, 6 Cush. (Mass.) 537 and authorities cited and reviewed; *Boatman's Sav. Bank v. Johnson*, 24 Mo. App. 316; *Rucker v. Robinson*, 38 Mo. 154, 90 Am. D. 412; *First Nat. Bank of Charlotte, v. Lineberger*, 83 N. Car. 454; 35 Am. R. 582; *Hodges v. Elyton Land Co.*, 109 Ala. 617; *Vielle v. Hoag*, 24 Vt. 46; *Big Rapids Nat. Bank, v. Peters* 120 Mich. 518.

43. See *Salmon v. Claggett*, supra; *Sohier v. Loring*, supra.

or a covenant never to sue him, with a reservation of rights against the surety.⁴⁴

§ 229. Form in Which Rights Must Be Reserved. The form in which rights against the surety must be reserved is discussed later on for the same formalities appear to be required here as in the case of an absolute release.⁴⁵

§ 230. Extension of Time Where Surety Indemnified. Where the surety holds full indemnity from his principal, he is not released by an unauthorized extension of time to the principal.⁴⁶ In such case the surety, to the extent of the indemnity which he holds, is regarded as in the situation of a principal,⁴⁷ and the same rule applies where there is an unauthorized release.⁴⁸

§ 231. Extension of Time Where Surety Consents—Waiver of Discharge—Part Payment. If the surety consents to the extension of time to his principal, either before or at the time the extension is granted, he is not released whether there is any reservation of rights or not,⁴⁹ and this is clearly the rule where he not only consents to the extension, but himself requests or procures it,⁵⁰ or the contract of suretyship or guaranty in terms

44. Post, sec. 240.

45. See Post, sec. 243; *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316.

46. *Fay v. Tower*, 58 Wis. 286, *Moore v. Paine*, 12 Wend. (N. Y.) 123; *Chilton v. Robbins*, 4 Ala. 223; 37 Am. D. 741; *Bradford v. Hubbard*, 8 Pick. (Mass.) 155; *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. R. 849; *Home Nat. Bank v. Waterman*, 134 Ill. 461.

47. *Smith v. Steele*, 25 Vt. 427, 60 Am. D. 276; *Kleinhaus v. Generous*, 25 Oh. St. 667.

48. *Jones v. Ward*, 71 Wis. 152; Post, sec. 240.

49. 1 Brandt Sur & Guar. (3rd Ed.) sec. 379, et seq; *Miller v. Spain*, 41 Oh. St. 773; *Rockville Nat. Bank v. Holt*, 58 Conn. 526, 18 Am. St. R. 293. Consent to one extension does not impliedly authorize another. *Merrimac Co. Bank v. Brown*, 12 N. H. 320; *Gray's Exrs. v. Brown*, 22 Ala. 262.

50. *Briggs v. Norris*, 67 Mich. 325.

provides for it.⁵¹ Even though the surety did not consent at or before the time of the extension, if he afterward, with knowledge of the facts, makes a new promise to pay, he will be liable without any new consideration. His promise to pay in such case is rather the waiver of a defense or the renewal of an old debt than the making of a new contract, and the action is upon the original undertaking,⁵² and his waiver and consent will be implied where he makes part payment with knowledge of the facts unless, at the time of payment, he disclaims liability.⁵³

But a promise of part payment made in ignorance of the fact that an extension of time has been given to the principal will not bind the surety,⁵⁴ unless, perhaps, such new promise is based upon a new and valuable consideration,⁵⁵ and the burden of showing that the surety had knowledge of the facts has been held to be upon the plaintiff.⁵⁶ But the surety's consent to an extension of time will not be implied, it seems, from the fact alone that he knows that an extension is about to be given and fails to object.⁵⁷

51. *Greenwood v. Francis*, 1 L. R. Q. B., (1899) 312; *U. S. v. McMullen*, 222 U. S. 460; *Robbins v. Robinson*, 176 Pa. 341; *Ayler v. Murray*, 7 Ind. App. 645.

52. 1 Brandt Sur. & Guar. (3rd Ed.) sec. 381; *Smith v. Winter*, 4 Mees. & W. 454; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; 18 Am. St. R. 293; *Fowler v. Brooks*, 13 N. H. 240; *Bramble v. Ward*, 40 Oh. St. 267; *Monmouth etc. Bank v. Whitman*, 66 Ill. 331.

53. *Hinds v. Ingham*, 31 Ill. 400 and cases in the note above.

54. *Montgomery v. Hamilton*, 43 Ind. 451; *Gamage v. Hutchins*, 23 Me. 565; *Rochester Sav. Bank v. Chick*, 64 N. H. 410; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. D. 685; *Fay v. Tower*, 58 Wis. 286.

55. *New Hampshire Sav. Bank v. Colcord*, *supra*.

56. *Gamage v. Hutchins*, 23 Me. 565.

57. *Polak v. Everett*, L. R. Q. B. D. 669 (1876); *Pickard v. Sears*, 6 Ad. & E. 469, 474; *Stewart v. Parker*, 55 Ga. 656; *Ex'rs. of Riggins v. Brown*, 12 Ga. 271; See also *Lambert v. Settler*, 71 Ia. 463. It has even been held that the surety was not discharged though he signed the extension agreement as a witness. *Edwards v. Coleman*, 6 T. B. Monr. (Ky.) 567. The contrary was held where he participated with the principal in the payment of interest in advance for the extension period. *New Hampshire Sav. Bank v. Col-*

But whether an extension of time, or any other change, was with the consent of the surety or without it, must depend upon the reasonable import of his words and conduct as interpreted in the light of all the relevant circumstances.⁵⁸

§ 232. Extension Must Be for Definite Time. The time for which the extension is granted to the principal without the surety's consent must be definite and fixed, otherwise the surety is not discharged. The reason for the rule is that if no definite time is fixed, the surety may pay the debt and proceed against the principal at any time after its maturity.⁵⁹ But what constitutes a definite time? Clearly a promise by the creditor to wait "awhile longer" does not discharge the surety,⁶⁰ and so, of an agreement "to give time for payment beyond the maturity of the notes."⁶¹ But an agreement upon consideration to extend the time of payment for "twenty or thirty days" was held to discharge an indorser, for the hands of the creditor were tied for at least twenty days,⁶² and an agreement to wait "until after threshing" was held to have the same effect.⁶³ As to an accommodation indorser, an agreement to extend the time "to

cord, 15 N. H. 119, 41 Am. D. 685. A request by sureties that the creditor "delay pressing" the principal does not justify a definite extension of time to the principal. *Warburton v. Ralph*, 9 Wash. 537.

58. See *U. S. v. McMullen*, 222 U. S. 460, 468, where consent was implied from the nature of the undertaking and the fact that a *per diem* deduction was provided for in the contract in case of delay.

59. *Wilson v. Lloyd*, L. R. 16 Eq. Cas. 60, 71; *Truesdell v. Hunter*, 28 Ill. App. 292; *Meniffee v. Clark*, 35 Ind. 304; *Jenkins v. Clarkson*, 7 Ohio. 72; *Rupert v. Grant*, 6 Sm. & M. (Miss.) 433; *Hayes v. Wells*, 34 Md. 512; *Woolfolk v. Plant*, 46 Ga. 422; *Morgan v. Thompson*, 60 Iowa 280; *Vary v. Norton*, 6 Fed. Rep. 808; *Miller v. Stem*, 2 Pa. St. 286; *Smith v. Shelden*, 35 Mich. 42, 24 Am. R. 529, and cases cited throughout this section.

60. *Jenkins v. Clarkson*, 7 Ohio 72.

61. *Ward v. Wick*, 17 Oh. St. 159.

62. *Hamilton v. Prouty*, 50 Wis. 592, 36 Am. R. 866.

63. *Posten v. Moulton*, 52 Wis. 169.

the summer'' of a given year is sufficiently definite to discharge him, as it is construed to mean until the first of June of that year, and so where the extension was ''until Fall,'' which means until the first day of September.⁶⁴ But an agreement to extend the time until ''some-time in the Summer'' has been held too indefinite to release the surety.⁶⁵ Where a debt for which there is a definite customary term of credit is extended without the consent of the surety beyond such customary period he is released.⁶⁶

64. *Abel v. Alexander*, 45 Ind. 523, 15 Am. R. 270.

65. *Miller v. Stem*, 2 Pa. 286; See also *Brandt Sur. & Guar.* (3rd Ed.) sec. 378; and cases cited. See also *Findley v. Hill*, 8 Oregon 247, 34 Am. Rep. 578, where it was held that an agreement to wait ''until after harvest'' was held not to discharge the surety.

66. *Combe v. Woolf*, 8 Bing. 156, 1 M. & S. 241.

CHAPTER XXIII.

EXTENSION OF TIME TO PRINCIPAL CONTINUED—RELEASE OF PRINCIPAL OR CO-SURETY—COVENANTS NOT TO SUE.

§ 233. **Contract Extending Time Must be Upon Consideration in Order to Release Surety.** In order that the guarantor or surety shall be discharged by an extension of time to his principal to which he does not consent, there must be a contract for such extension valid between the creditor and principal debtor,¹ and such contract, to be valid, must be supported by a valuable consideration unless it is under seal.² It has also been held, upon this principle, that an extension of time granted in consideration of a promise void by the Statute of Frauds will not discharge a surety.³

§ 234. **What Constitutes Sufficient Consideration for Valid Extension—Payment or Promise to Pay Interest.** In order that the consideration may support the exten- . . .

1. Ante, sec. 227.

2. See 1 Brandt Sur. & Guar. (3rd Ed.), sec. 376; English v. Darley, 2 B. & P. 61; McLemore v. Powell, 12 Wheat. (U. S.) 554; Oberndorff v. Union Bank, 31 Md. 126, 1 Am. R. 31; Scott v. Fisher, 110 N. Car. 311, 28 Am. St. R. 688; Fanning v. Murphy, 126 Wis. 538, 110 Am. St. R. 946; 4 L. R. A. (N. S.) 66n; Davis v. Stout, 126 Ind. 12, 22 Am. St. R. 565; Reynolds v. Ward, 5 Wend. (N. Y.) 501 and cases cited throughout this and the next two sections. The payment of money or delivery of anything else of value not already due and owing by the principal to the creditor would of course constitute a sufficient consideration for the extension. Moulton v. Posten, 52 Wis. 169.

3. Philpot v. Briant, 4 Bing. 717; Agee v. Steele, 8 Ala. 948; Berry v. Pullen, 69 Me. 101, 104. So where the extension agreement was void because unknown to the creditor, the names of sureties thereon were forged. Bowman v. Humphrey, 18 Ky. L. 511. See as to extension agreements based upon an usurious consideration Post, sec. 235.

If the extension is void as to part of a debt only, or valid as to part only, it would seem that the surety remains liable for the balance. Dowden v. Lewis, 14 L. R. Ir. 307.

sion agreement, it must be both lawful and valuable within the familiar principles of contract law, unless such agreement be under seal. A promise to pay an increased rate of interest for the extension period⁴ and *a fortiori* the actual payment of interest at such increased rate in advance,⁵ is clearly a sufficient consideration to support the agreement, and actual payment of interest in advance at the legal rate, or at the contract rate, or even at a less rate than the legal rate or original contract rate, is probably everywhere so clearly sufficient for that purpose that the citation of authorities would be superfluous.⁶

But whether a mere promise to pay at the *end* of the extension period interest at the legal rate, or at the rate reserved by the contract and recoverable by law after default, is a sufficient consideration to support the extension agreement and hence to release the surety, has given rise to conflicting views. By the better opinion it should have this effect, at least where the extension is for a definite time, whether the agreement is to pay the legal rate of interest, the original contract rate, or even, perhaps, a lower rate. The reasoning in support of this rule is well expressed in the dissenting opinion of Mr. Justice Dodge, in *Fanning v. Murphy*,⁷ as follows: "I agree that the mere payment or promise of payment of any part of the money, principal or interest, which the debtor is already bound to pay by the terms of the existing note, is not such a valuable consideration. But when a debtor, having the right at his pleasure to pay a debt

4. Payment at the old rate semi-annually, instead of annually as provided for in the original contract will support an extension agreement. *Scott v. Fisher*, 110 N. Car. 311, 28 Am. St. R. 688. The giving of additional security is of course sufficient. *Overend Gurney & Co. v. Oriental Financial Corporation*, L. R. 7, H. L. 348.

5. *Batavian Bank v. McDonald*, 77 Wis. 486.

6. See 1 Brandt, *Sur. & Guar.* (3rd Ed.), sec. 386 and cases cited. As to the effect of payment or receipt of interest in advance as evidence of an extension agreement, see Post, sec. 239. As to the payment of usurious interest as a consideration, see Post, sec. 235.

7. 126 Wis. 538, 110 Am. St. R. 946, 4 L. R. A. (N. S.) 666n.

and thus to terminate his liability for interest and to deprive the creditor of an interest bearing investment for his money, agrees to forego such right for a definite period, I can see no escape from the view that such agreement on his part is both a benefit to the creditor and a detriment to himself such as, according to legal definitions, constitutes a valid consideration for the creditor's promise to forego his right to insist on payment during the same period. We all know that, in ordinary business affairs, investors of money are ready to make various concessions in the way of lower rates of interest and the like in consideration of receiving a permanent investment in lieu of one which may be terminated at the option of the debtor. Such distinction is considered valuable and worth paying for. It also disables the debtor from paying up and thus saving interest; a valuable right. I am amazed to find in the opinion filed a statement that the weight of authority is against this proposition."⁸ There is, high authority the other way, however, based upon the familiar principle that doing or promising to do what one is already bound to do can afford no consideration for a promise on the other side, and hence can afford no consideration for an agreement by the creditor to forbear or to extend the time of payment in favor of the creditor even for a definite time.⁹

8. In support of these views see *Crossman v. Wohlleben*, 90 Ill. 537; *Dodgson v. Henderson*, 113 Ill. 360, 364; *English v. Landon*, 181 Ill. 614; *Benter v. Dillon*, 63 Ill. App. 517; *Bailey v. Adams*, 10 N. H. 162; *Fowler v. Brooks*, 13 N. H. 240; *McComb v. Kittridge*, 14 Ohio, 348; *Wood v. Newkirk*, 15 Ohio St. 295; *Alley v. Hopkins*, 98 Ky. 668, 56 Am. St. R. 382; *Fawcett v. Freshwater*, 31 Oh. St. 637; *Chute v. Pattee*, 37 Me. 102; *Brown v. Prophit*, 53 Miss. 649; *Simpson v. Evans*, 44 Minn. 419; *Dillaway v. Peterson*, 11 S. Dak. 210; *Shuler v. Hummel* (Neb.), 95 N. W. 350; *Eaton v. Whitmore*, 3 Kan. App. 760; *Green v. Lake*, 2 Mackey, 162; 2 Hare & Wall. Ld. Cas. (5th Ed.) 469; *Reed v. Tierney*, 12 App. D. C. 165; *Nelson v. Flagg*, 18 Wash. 39. Similar reasoning which seems unanswerable will be found in *Benson v. Phipps*, 87 Tex. 578, 47 Am. St. R. 128, and in most of the cases cited above. See also the dissenting opinion of Davies, J. in *Kellogg v. Olmstead*, 25 N. Y. 189.

9. 1 Brandt on Guar. & Sur. (3rd Ed.), sec. 388; *Fanning v. Murphy*, supra; *Hughes v. Southern W. Co.*, 94 Ala. 613; *Harburg v.*

Many cases cited by courts and text writers as supporting this latter rule, however, may be distinguished upon the ground that there was no distinct and definite promise by the creditor to indulge the debtor for any definite time; nothing in fact to legally stay his hand had he chosen at any time to pursue his remedies against the creditor;¹⁰ and it is settled, of course, that even an agreement for a definite extension of time is invalid and will not release the surety where there is nothing to support it beyond a promise to pay or perform, or the actual payment or performance, whether in whole or in part, of something *already due* or accrued by the terms of the original contract, whether it consists of principal or interest.¹¹ But a partial payment before it is due, whether of principal or interest, is of course a valid consideration for an extension as to the debt or the unpaid balance of the debt.¹²

Kumpf, 151 Mo. 16; Reynolds v. Ward, 5 Wend. (N. Y.) 501; Kellogg v. Olmstead, 25 N. Y. 189; Wilson v. Powers, 130 Mass. 127; Tatum v. Morgan, 108 Ga. 336; Shayler v. Giddins, 122 Mich. 659.

10. See Crossman v. Wohlleben, 90 Ill. 537; Shayler v. Giddins, 122 Mich. 659.

11. 1 Brandt, Sur. & Guar. (3rd Ed.), sec. 387; Oberndorf v. Union Bank, 31 Md. 126, 1 Am. R. 31; Halliday v. Hart, 30 N. Y. 474; Davis v. Stout, 126 Ind. 12, 22 Am. St. R. 565; Hall v. Bardwell, 1 C. P. Rep. (Pa.) 23; Roberts v. Stewart, 31 Miss. 664; Stroud v. Thomas, 139 Cal. 274, 96 Am. St. R. 111; Petty v. Douglass, 76 Mo. 70; Walz v. Parker, 134 Mo. 158; Sully v. Childress, 106 Tenn. 109, 82 Am. St. R. 875 and cases cited; Higgins v. McPherson, 118 Ill. App. 464; King v. State Bank, 9 Ark. 185, 47 Am. D. 739; Caldwell v. McVicar, 9 Ark. (4 Eng.) 418; Jenkins v. Clarkson, 7 Ohio 72; Matthewson v. Strafford Bank, 45 N. H. 104; Petty v. Douglass, 76 Mo. 70; Ingels v. Sutliff, 36 Kan. 444. An agreement to give the principal further time of eighteen months in consideration of his paying the arrears of interest and keeping the interest down as it accrued in future, was without consideration and insufficient to release the surety. Tucker v. Laing, 2 Kay & J. 745.

12. 1 Brandt, *supra*; Sully v. Childress, *supra*. See McKinney v. McNabb, 97 Tenn. 237, where it was held that the payment of a part of a debt before the expiration of the days of grace was too technical to be regarded as a consideration to support an extension agreement in discharge of a surety. To similar effect see Sully v. Childress, *supra*.

§ 235. Usurious Interest as a Consideration for Extension Agreement. A mere contract for the payment of usurious interest, like any other illegal consideration, will not support an agreement for extension of time so as to discharge a guarantor or surety.¹³

But where the extension is granted in consideration of usurious interest actually paid in advance, the weight of authority is in favor of the rule that it constitutes a sufficient consideration to render the agreement binding, and will hence release the surety. These holdings would seem to be clearly right where the usurious interest could not be recovered back.¹⁴ And even where the usury statute is so framed that the creditor may recover such interest in whole or in part, or even a penalty from the creditor, the extension is nevertheless binding. The reasoning upon which the cases proceed is not always identical. Usually, however, it is argued that the defense of usury, like that of infancy, is personal to the borrower.¹⁵ It might also be suggested that inasmuch as the creditor has actually received the illegal interest, and will have the use of it, at least until the debtor re-

13. *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. R. 572; *Armistead v. Ward*, 2 Patton, Jr. & H. (Va.) 504; 1 Brandt, Sur. & Guar. (3rd Ed.), sec. 390; and cases cited in note 36 *Fernan v. Doubleday*, 3 Lans (N. Y.) 216; *Berry v. Pullen*, 69 Me. 101; *Roberts v. Stewart*, 31 Miss. 664. That the extension in such case is valid where it is given for a note tainted with usury, see *Moulton v. Posten*, 52 Wis. 169; *Fay v. Tower*, 58 Wis. 286; *Corielle v. Allen*, 13 Ia. 289; *Scott v. Saffold*, 37 Ga. 384. That a note tainted with usury is to be treated like any other executory promise and is no consideration for the extension, see *Kyle v. Bostick*, 10 Ala. 589; *Anderson v. Mannon*, 7 B. Monr. (Ky.) 217; *Roberts v. Stewart*, 31 Miss. 664; *Wilson v. Langford*, 5 Humph. (Tenn.) 320; *Smith v. Woodbury*, 36 Vt. 303.

14. See *Billington v. Wagoner*, 33 N. Y. 31; *Niblack v. Champney*, 10 S. Dak. 165; *Parsons v. Harrold*, 46 W. Va. 422; *Graysons App.* 108 Pa. St. 581.

15. *Scott v. Harris*, 76 N. C. 205, 207, 208; *Hamilton v. Prouty*, 50 Wis. 592, 36 Am. R. 866; *Myers v. Bank*, 78 Ill. 257; *Wittmer v. Ellison*, 72 Ill. 301; *Austin v. Dorwin*, 21 Vt. 38; *Turrill v. Boynton*, 23 Vt. 142; *Bank v. Woodward*, 5 N. H. 99, 20 Am. D. 566; *Cox v. Railroad Co.*, 44 Ala. 611; *Kenningham v. Bedford*, 1 B. Mon. (Ky.) 325; *Armistead v. Ward*, 2 Patton & Heath (Va.) 504.

covers it from him, this should be a sufficient consideration for the extension of time. But where the statute declares void all contracts infected with usury, or that the usurious interest may be recovered back, some courts have held that the actual payment of usury is not a sufficient consideration, and that the surety is not released by the extension agreement.¹⁶ It is often argued in effect that under such statutes the usurious interest must be regarded as a part payment of the debt, and as part payment at maturity is no consideration for an extension agreement, such agreement is nudum pactum and void,¹⁷ and the surety is not released.¹⁸

§ 236. Creditor Must Have Knowledge of Suretyship Relation. If, at the time of granting an extension to the principal, the creditor has no knowledge that another bound with the principal is merely a surety, the surety is not released. If he had such knowledge at the time the principal contract was entered into, however, the surety is released by a subsequent valid extension of time to the principal without his consent.¹⁹

16. *Vilas v. Jones*, 1 N. Y. 274, with which compare *Billington v. Wagoner*, 33 N. Y. 31; *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. R. 572, (Dictum overruled in *Hamilton v. Prouty*, *supra*); *Galbraith v. Fullerton*, 53 Ill. 126; *Sellmeyer v. Schaffer*, 60 Ill. 497; *Anderson v. Mamon*, 7 B. Monr. (Ky.) 217; *McKamby v. McNabb*, 97 Tenn. 326 and cases cited.

17. *Supra*, note 10.

18. *Jenness v. Cutler*, 12 Kan. 500; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Nightingale v. Meginnis*, 34 N. J. 461; *Farmers' & Trad. Bank v. Harrison*, 57 Mo. 503; *Hartman v. Danner*, 74 Pa. 36; *Calvert v. Good*, 95 Pa. 65. (Compare *Grayson's App.*, 108 Pa. 581); *Cornwell v. Holly*, 5 Rich. (S. C.) 47. The case of *Howell v. Sevier*, 1 Lea (Tenn.), 860, 27 Am. R. 771, if not to be supported on this ground, seems erroneous. *McKamby v. McNabb*, *supra*.

19. *Pooley v. Herradine*, 7 El. & Bl. 431, 90 E. C. L. 430; *Hall v. Capital Bank*, 71 Ga. 715; *Morgan v. Thompson*, 60 Ia. 280. The burden of proving the creditor's knowledge of the suretyship relation is upon the surety where it does not as it would in the case with an ordinary collateral guaranty, appear on the face of the instrument. *Agnew v. Merritt*, 10 Minn. 308; *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. R. 155; *Morgan v. Thompson*, *supra*.

Where the creditor was unaware of the suretyship relation until after the contract was entered into, however, or the relation between the promisors has subsequently been changed from that of principals to that of principal and surety *inter se*, without the privity or consent of the creditor, the cases are not agreed that a subsequent extension to the principal with knowledge of the suretyship will discharge the non-assenting surety. By the weight of authority, English and American, however, the surety is released. All that is necessary is that the creditor should know of the relation when the extension of time is granted.²⁰ Indeed this is the common situation and almost universal ruling where property has been sold subject to a mortgage and the vendee assumes and agrees to pay the mortgage debt, and the creditor has notice of the arrangement;²¹ and so where a partner retires and arranges with his co-partner that the latter shall assume and pay the firm debts, and the creditor is aware of the changed relations of the parties, *inter se*.²² As we have seen, however, a respectable minority

20. Ante, sec. 8. *Swire v. Redman*, 2 Q. B. D. 536; *Rouse v. The Bradford Banking Co.*, H. L. App. Cas. (1894) 586, reviewing prior decisions; *Gipson v. Ogden*, 100 Ind. 20; *Home Bank v. Waterman*, 134 Ill. 461, 467; *Harris-Seller Co. v. Bond*, 20 Ky. L. 897; *Smith v. Shelden*, 35 Mich. 42, 24 Am. R. 529; *Millerd v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. R. 90; *Dodd v. Dreyfus*, 17 Hun (N. Y.), 600; *Main v. Canavan*, 8 Daly (N. Y.), 272; *Leithauser v. Baumeister*, 47 Minn. 151, 28 Am. St. R. 336; *Hall v. Johnson*, 6 Tex. App. 110; *Zapalac v. Zapp*, 22 Tex. Civ. App. 375; *Maingay v. Lewis, Jr.*, 5 C. L. 229 (reversing s. c. *Ir. R. 3 C. L. 495*); *Mathers v. Halliwell*, 10 Grant Ch. 172; *Blackley v. Kenney*, 19 Ont. App. 169 (compare *Aldous v. Hicks*, 21 Ont. App. 95); *Bailey v. Griffith*, 40 Up. Can. Q. B. 418. But see *Birkett v. McGuire*, 7 Ont. App. 53, and *Allison v. McDonald*, 23 Ont. App. 288, 20 Ont. App. 695.

21. See Ante, secs. 8, 10. *Murry v. Marshall*, 94 N. Y. 611; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. R. 130; *George v. Snowden*, 60 Md. 26, 45 Am. R. 706; *Chilton v. Brooks*, 72 Md. 554; *Union Co. v. Harford*, 143 U. S. 187, with which compare *Keller v. Ashford*, 133 U. S. 610. Contra, *James v. Day*, 37 Iowa, 164; *Corbet v. Waterman*, 11 Iowa, 86.

22. Ante, sec. 8 and cases cited; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. R. 90; *Smith v. Shelden*, 35 Mich. 43; *Wiley v. Temple*, 85 Ill. App. 69.

of the courts hold that where parties have promised jointly as principals, the creditor may deal with them as such even after notice that one or more of them have become principals and one or more of them sureties inter se by agreement among themselves,²³ as where one or more partners retire and the remaining partners agree to assume and pay the firm debts, unless the creditor assent to such arrangement.²⁴ But where two or more execute a note (or other obligation) for what is really a joint liability, though they are in some respects sureties for each other, the doctrine by which a surety in the proper sense of the term is exonerated from liability by a contract with the principal giving time for payment without the assent of the surety, has never been applied. The transaction, at least if by parol, is deemed a mere covenant not to sue,²⁵ and this rule applies where the party claiming release by reason of the extension to his co-promisor is in fact a surety, if his suretyship does not appear on the face of the transaction, and is unknown to the creditor when the extension was granted.²⁶

23. Ante, secs. 8, 10. *James v. Day*, 37 Ia. 164; *Barnes v. Boyer*, 34 W. Va. 303; *Sharpleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. R. 783; *Rawson v. Taylor*, 30 Oh. St. 389, 27 Am. R. 464.

24. Ante, sec. 8, and cases in the note above; *Sharpleigh Hardware Co. v. Wells*, supra, and cases cited; see *First Nat. Bank v. Cheney*, 114 Ala. 536, where counsel have collected a large number of authorities. As to the necessity of consideration for the agreement to look to the remaining partners, see *Fowler v. Croker*, 107 Ga. 817; *Motley v. Wyckoff*, 113 Mich. 231.

25. *Lacy v. Kynaston*, 12 Mod. 548; *Dean v. Newhall*, 8 Term. R. 168; *Neel v. Harding*, 2 Met. (Ky.) 247, 250; *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. R. 155; (surety but not known to be such). See also *Parsons v. Harrold*, 46 M. & A. 122; *Draper v. Weld*, 13 Gray (Mass.), 580; *Roberts v. Strange*, 38 Ala. 566, 82 Am. D. 729 (co-partners); *Kenderick v. O'Neil*, 48 Ga. 531; *Bradford v. Prescott*, 85 Me. 482, 487; *Shed v. Pierce*, 17 Mass. 622; *Durell v. Wendell*, 8 N. H. 369; see Post, sec. 241, as to the rule where there is an absolute release of one or more joint promisors liable in the same rank.

26. *Neel v. Harding*, supra; *Mullendore v. Wertz*, supra, and cases cited and distinguished.

§ 237. **Is Surety on a Specialty Discharged by Parol Extension?** By the common law a specialty can only be rescinded or modified by an instrument of equal dignity. It has therefore been held that a parol extension of time for payment or performance of a specialty is not sufficient at law to release a surety thereon, for it does not tie up the hands of the creditor against the principal.²⁷ In equity, however, the rule is different, at least if the parol agreement had been acted upon,²⁸ and the strong tendency is to permit the defense of a parol extension both at law and in equity,²⁹ particularly where, as in the code states, equitable defenses are permitted in legal actions.³⁰

§ 238. **Pleading Extension of Time.** Having ascertained what constitutes such an extension of time to the principal by the creditor as will discharge a non-assenting surety, a few words as to the pleading, proof and presumptions where such agreements are involved may be helpful.

An unauthorized extension of time is an affirmative defense in most circumstances and should be pleaded and proved.³¹ The pleader must state facts and not conclu-

27. *Davey v. Prendergrass*, 5 B. & Ald. 187, 7 E. C. L. 62; *Devers v. Ross*, 10 Gratt. (Va.) 252, 60 Am. D. 331; *Wittmer v. Ellison*, 72 Ill. 301; *Glenn v. Morgan*, 23 W. Va. 467.

28. *Reese v. Berrington*, 2 Ves. Jr. 540; *Paine v. Voorhees*, 26 Wis. 522; *Carter v. Duncan*, 84 N. Car. 676; *Dixon v. Spencer*, 59 Md. 246.

29. *Paine v. Voorhees*, *supra*.

30. See *Armistead v. Ward*, 2 Patton Jr. & Heath (Va.) 504; *Smith v. Crease's Exrs.*, 2 Cranch C. C. 481; *Bangs v. Mosher*, 23 Barb. (N. Y.) 478; *Dixon v. Spencer*, 59 Md. 246, 249, and cases cited; *Carter v. Dunsen*, 84 N. Car. 676, and cases cited; *Weed Sewing Mach. Co. v. Obericht*, 38 Wis. 325. That the defense of a parol extension is now allowed under the Judicature Acts (36 & 37 Vict. c. 66), sec. 24 (2). See Ante, sec. 227, note 40. Clearly a specialty may be extended by a specialty. *Boultree v. Stubbs*, 18 Ves. 19.

31. *McCormick Harvesting Machine Co. v. Rae*, 9 N. Dak. 482; *National Citizens Bank v. Toplitz*, 178 N. Y. 464 and cases cited. It may in some states be shown under the general issue, at least where it involves an alteration upon the face of the contract itself. See *Andrews' Stephen's Pl.*, sec. 117; *Harrison v. Thackaberry*, 243 Ill. 512, 516 and authorities cited.

sions of law. Hence a statement that the time was extended "for a good consideration," without alleging what that consideration was is insufficient.³² The plea should show an extension for a definite time, and not merely that the time was extended, and should negative consent,³³ and, upon principle, should show that the creditor knew of the suretyship relation, at least where that is not apparent from the declaration itself.³⁴

Extension of time, like payment or release, being an affirmative defense, should be proved by a preponderance of the evidence.³⁵

§ 239. Proof and Presumptions of Extension of Time.

While the mere taking of the debtor's note maturing at a time later than the original debt is not absolute payment thereof unless the parties so agree, it is, nevertheless, presumptive evidence of a bargain for credit, and an action for the original debt is *prima facie* premature until such note is due and payable. Though there is no legal merger in such cases, and suit may usually be brought upon the original consideration at the maturity of the note upon delivering it up at the trial, the receipt of the note has always been considered a valid agreement between the parties and a suspension of the day of payment until the note becomes due, in the absence of evidence of a different intent.³⁶ And it has been held that

32. *McCormick Harvesting Mach. Co. v. Rae*, *supra*; *Palmer v. White*, 65 N. J. L. 69; *Winne v. Cold Springs Co.*, 3 Col. 155. See also *Davenport v. King*, 63 Ind. 64, where a plea that the extension was "pursuant to a valid contract" was held insufficient.

33. *Prather v. Young*, 67 Ind. 480; *Chrisman v. Perrin*, 67 Ind. 586; *Tuohy v. Woods*, 122 Cal. 665; *McCormick Harvester Co. v. McRae*, *supra*.

34. See 1 *Brandt, Guar. & Sur.* (3rd Ed.), sec. 415, note 41.

35. *Bramble v. Ward*, 40 Oh. St. 267; *Gray v. Farmers Nat. Bank*, 81 Md. 631. See also *Columbia, etc. Co. v. Mitchell's Admr.* (Ky. App. 1903), 72 S. W. 350.

36. *Walton v. Mascall*, 13 M. & W. 452; *Fellows v. Prentiss*, 3 Denio (N. Y.), 512, 45 Am. D. 484; *Robinson v. Offutt*, 7 T. B. Mon. (Ky.) 540; *Morton v. Roberts*, 4 T. B. Mon. (Ky.) 491; *Andrews v. Marrett*, 58 Me. 539, and cases cited and reviewed; *Hubbard v. Gurney*, 64 N. Y. 457; *Weed Sewing Mach. Co. v. Oberreicht*, 38 Wis. 325.

taking a note for interest in advance would have the same effect as evidence of an extension of time.³⁷

But the inference of an extension of time through the taking of a note or bill may be controlled by the express agreement of the parties that the remedy on the original debt or security shall not be suspended, and such agreement may doubtless be shown by parol.³⁸ No presumption of an extension agreement arises, however, from the simple taking of a mortgage or other securities purely collateral though such securities mature later than the original debt.³⁹

The payment of interest in advance, and the receipt of the same by the creditor, without further or countervailing proof, will not only justify a court in holding that the time for payment had been extended, but standing alone is deemed by many authorities conclusive of the fact.⁴⁰

37. *Darling v. McLean*, 20 Up. Can. (Q. B.) 372. The same rule has been applied where the debt for which the surety was bound was upon open account. *Appleton v. Parker*, 15 Gray (Mass.), 173.

38. *Wyke v. Rogers*, 1 De Gex M. & G. 408; *Paine v. Voorhees*, 26 Wis. 522; *Jones v. Carchetti*, 61 Ia. 520, and authorities cited; *Hagey v. Hill*, 75 Pa. 108; *Schlager v. Teal*, 185 Pa. 322.

39. *Megalar v. Groves*, 1 Fed. 279; *U. S. v. Hodge*, 6 How. (U. S.) 270; *Thurston v. Gardner*, 6 R. I. 103; *Stallings v. Lane*, 88 N. Car. 214; *Paine v. Voorhees*, supra, at p. 533, and cases cited; *Scanland v. Settle*, 19 Tenn. (Meigs) 169; *Smith v. Clopton*, 48 Miss. 66; *Kingmann Co. v. McMaster*, 118 Mo. App. 209; *Austin v. Curtis*, 31 Vt. 64; *Burke v. Cruger*, 8 Tex. 66, 58 Am. D. 102. See *Remsen v. Graves*, 41 N. Y. 471; *Christie v. Martien*, 32 Mo. 438. The giving of collaterals is of course a valid consideration for an agreement extending the time. *Kane v. Cortsey*, 100 N. Y. 132.

40. *Batavian Bank v. McDonald and another*, 77 Wis. 486, 500, citing *Brandt*, Sur., sec. 305, and cases cited; *Blake v. White*, 1 Younge & C. 420; *Crosby v. Wyatt*, 10 N. H. 323; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602; *Siebeneck v. Anchor S. Bank*, 111 Pa. St. 187; *Randolph v. Fleming*, 59 Ga. 776; *Woodburn v. Carter*, 50 Ind. 376; *Warner v. Campbell*, 26 Ill. 282; *People's Bank v. Pearsons*, 30 Vt. 711; *Rose v. Williams*, 5 Kan. 483; *Christner v. Brown*, 16 Iowa, 130; *Siebeneck v. Anchor Sav. Bank*, 111 Pa. 187. To the same effect see *New York Life Ins. Co. v. Casey*, 178 N. Y. 381, 389; *Callaway's Exrs. v. Price's Adm'rs.*, 32 Gratt. (Va.) 1; *Hitchcock v. Frackleton*, 116 Mich. 487, 491; *Hollingsworth v. Tomlinson*, 108 N. Car. 245; *New Hampshire Sav. Bank v.*

§ 240. **Release of Principal as Release of Surety.** Where the creditor effectually releases the principal debtor, whether by instrument under seal or by a parol composition upon sufficient consideration, the surety is likewise released unless he consents to be bound notwithstanding such release, or unless the creditor, at the time, reserves his rights against the surety,⁴¹ or the surety is fully indemnified.⁴² If he reserves his rights in such case, however, the release is ordinarily construed as a mere covenant not to sue with a reservation of rights.⁴³ The reasoning here is practically the same as applies where a valid extension of time is granted the principal without the consent of the surety, and cases under that head and this one are cited interchangeably.⁴⁴

Colcord, 15 N. H. 685, 41 Am. D. 685; Bank of Columbia v. Jeffs, 15 Wash. 230. Compare Welch v. Kukuk, 128 Wis. 419.

But a number of cases appear to hold that payment of interest in advance, at least upon an overdue debt, is not of itself sufficient to establish even prima facie an extension agreement. Vilas v. Jones, 10 Paige (N. Y.), 76; Hosea v. Rowley, 57 Mo. 357, and cases cited; Coster v. Mesner, 58 Mo. 549; Citizens' Bank v. Moorman, 38 Mo. App. 484; Freeman's Bank v. Rollins, 13 Me. 202; Williams v. Smith, 48 Me. 135; Haydenville Sav. Bank v. Parsons, 138 Mass. 53, and cases cited. In this last case there were circumstances sufficient to rebut any presumption of an extension agreement even if it had been conceded to arise from the payment of interest. In Crosby v. Wyatt, 23 Me. 156, there was a custom of banks known to both parties to accept interest in advance and still hold the sureties. See also Oxford Bank v. Lewis, 8 Pick. (Mass.) 458.

41. Perry v. National Provincial Bank of England, 1 Ch. D. (1910) 464, and cases cited; Cragoe v. Jones, L. R. 8 Exch. 81; and cases throughout this section.

42. Criva v. Fleming, 101 Ind. 154; Jones v. Ward, 71 Wis. 152.

43. See Bank of Tasmania v. Jones (1893) App. Cas. 313, 316; Kearsly v. Cole, 16 M. & W. 128, and cases cited. Cowper v. Smith, 4 M. & W. 519; Bateson v. Gosling, 7 L. R. C. P. 9; Union Bank of Manchester v. Smith, 3 M. & C. 672; Rockville Nat. Bank v. Holt, 58 Conn. 526, 18 Am. St. R. 293. If there is a complete novation of the principal's obligation so that his obligation is entirely extinguished by its assumption by another, reservation of rights against the surety has been held ineffectual. Bank of Tasmania v. Jones, supra.

44. Price v. Barker, 4 El. & Bl. 760; Ex. p. Gifford, 6 Ves. 805; Boatmens Sav. Bank v. Johnson, 24 Mo. App. 316 and cases cited; Rockville Nat. Bank v. Holt, supra; Paddleford v. Thatcher, 48 Vt. 574;

§ 241. **Release of Surety as Release of Co-Surety.** It is a long settled rule of the common law that the technical and effectual release of one of two or more joint or joint and several debtors discharges all.⁴⁵ A reservation of rights against the remaining co-promisors, however, will prevent this result upon reasoning already stated.⁴⁶ Upon this principle, if co-sureties are bound jointly, or jointly and severally by the same obligation, rather than severally by the same or different instruments, the binding and unqualified release of one of them releases the other or others absolutely at common law,⁴⁷ though only pro tanto in equity, or, in other words, to the extent that the surety released would otherwise be bound to contribute to the common liability, where there is no alteration of the contract subjecting the remaining sureties to a different or increased risk.⁴⁸ This equitable rule seems now to be the prevailing one at law, at least under

Mueller v. Dohschuetz, 89 Ill. 176, 182, and authorities cited; Ante, sec. 228.

45. See Co. Litt. 232a; Clayton v. Kynaston, 2 Salk. 573; Bonney v. Bonney, 29 Ia. 448; Bradford v. Prescott, 85 Me. 482; Clark v. Mallory, 185 Ill. 227; Bouchard v. Dias, 3 Denio (N. Y.), 242, and cases cited, *infra*, note 49; Gordon v. Moore, 44 Ark. 349, 51 Am. R. 606.

46. Ante, sec. 228; Thompson v. Lack, 3 C. B. 540; Kearsley v. Cole, 16 M. & W. 128, 136, Per Parke, B.; Price v. Barker, 4 El. & Bl. 760, 82 E. C. L. 760; Bonney v. Bonney, *supra*; Glasscock v. Hamilton, 62 Tex. 143, 168, 169; Hewitt v. Adams, 1 Pat. & H. (Va.) 34; Bradford v. Prescott, *supra*.

47. Evans v. Bremridge, 2 K. & J. 174, 183; Nicholson v. Revell, 4 A. & E. 675; Price v. Barker, *supra*; Ward v. Nat. Bank, 8 App. Cas. 755, 764; Mercantile Bank v. Taylor, 93 App. Cas. 317, affirming s. c. L. R. 12 N. S. Wales, 252; People v. Buster, 11 Cal. 215; Spencer v. Houghton, 68 Cal. 82; Stockton v. Stockton, 40 Ind. 225; Massey v. Brown, 4 S. Car. 85; Clark v. Mallory, 185 Ill. 227. If the release is by parol and is not founded upon any consideration the co-surety is not released; City of Deering v. Moore, 86 Me. 181, 41 Am. St. R. 534.

48. Gordon v. Moore, 44 Ark. 349, 51 Am. R. 606; Smith v. State, 46 Md. 617; State v. Matson, 44 Mo. 305; Massey v. Brown, 4 S. Car. 85; Dodd v. Winn, 27 Mo. 501; Thompson v. Adams, Freem. Ch. (Miss.) 225; Waggener v. Dyer, 11 Leigh (Va.), 384; Klingensmith v. Klingensmith, 31 Pa. St. 460; See *Ex parte Gifford*, 6 Ves. 805; Cardwell v. Smith, 2 T. L. R. 779; Williams-Thompson Co. v. Williams, 10 Ga. App. 251, under Civ. Code (1910), sec. 2542.

the codes,⁴⁹ particularly where the release is given upon payment by the surety of his proportionate share of the debt,⁵⁰ and has been established by statute in many states as to joint or joint and several promisors generally who are liable in the same rank.⁵¹ It is of course the common law rule where the obligation of the sureties is several merely and not joint or joint and several,⁵² as where it is founded upon separate instruments.

Where the name of a surety is erased from the written contract, however, without the consent of his co-sureties, the latter are wholly released upon the ground of material alteration of the written contract.⁵³

§ 242. Covenants not to Sue Co-Debtor or Principal—Effect of Reservation of Rights. When we come to the effect on the liability of others bound for the same debt of a covenant by the creditor not to sue one of the co-debtors, as distinguished for a technical release, there is considerable confusion in the language of the books, if not in the decisions themselves. It appears to be settled that a covenant to forbear perpetually against a sole debtor or against all of several joint or joint and several debtors, operates as a release, for to permit the creditor to sue contrary to such covenant would give rise to an immediate cause of action for its breach, in which the damages would be the amount of the original debt. The courts, therefore, to avoid circuitry of action, hold the covenant a bar.⁵⁴

49. *Gordon v. Moore*, supra; *Schock v. Miller*, 10 Pa. (Barr.) 401; *Morgan v. Smith*, 70 N. Y. 537; *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. R. 210; see, also, *Thomason v. Clark*, 31 Ill. App. 404, and cases cited.

50. See *State v. Atherton*, 40 Mo. 209.

51. See *Walsh v. Miller*, 51 Oh. St. 463; *Jemison v. Governor*, 47 Ala. 390; *Alford v. Baxter*, 36 Vt. 158; *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. R. 861; Wis. Stat. (1911), secs. 4204, 4205.

52. See, however, *City of Deering v. Moore*, 86 Me. 181, 41 Am. St. R. 535.

53. *Metcalf Co. v. Scott*, 1 Ky. L. 422; *Cass Co. v. Am. Exch. Bank*, 11 N. Dak. 238, and cases cited.

54. *Hodges v. Smith Cro. Eliz.* 623; *Smith v. Mapleback*, 1 T. R. 441, 446; *Ford v. Beech*, 11 Q. B. 852; *Flinn v. Carter*, 59 Ala. 364;

But in case of a covenant not to sue one of several joint or joint and several debtors who are principals the courts regard the original joint or joint and several obligation as still intact, and the co-debtors are not discharged, for in no other way can the intention of the parties be carried out. The remedy of the covenantee in such cases is to sue for breach of the covenant, and he may recover substantial damages in such action if he is molested for the debt either by the creditor, or by his co-promisors in virtue of their right to contribution,⁵⁵ and a valid parol extension of time given to one of two or more joint promisors whose obligations are equal, whether they be joint principals or joint sureties, does not discharge the other, or others, though they do not consent. It is no more than a covenant not to sue.⁵⁶ But where a covenant never to sue is in favor of a principal debtor whose co-promisors are mere sureties rather than co-debtors, in the ordinary sense, and the fact of suretyship is known to the creditor, the transaction has the same

Foster v. Purdy, 5 Met. (Mass.) 442; Guard v. Whiteside, 13 Ill. 7; Phelps v. Johnson, 8 Johns. (N. Y.) 54; Chenango Bank v. Osgood, 4 Wend. (N. Y.) 607; Thurston v. James, 6 R. I. 103, 13 and cases cited.

55. Fitzgerald v. Trant, 11 Mod. 254; Lacy v. Kynaston, Holt 178, 1 Ld. Raym. 688, 2 Salk. 575, 12 Mod. 548; Dean v. Newhall, 8 T. R. 168 (1799); Hutton v. Eyre, 6 Taunt. 289 (1815); Duck v. Mayeu (1892), 2 Q. B. 511, 513; Garnett v. Macon, 2 Brock. (U. S.) 185, 220; Roberts v. Strang, 38 Ala. 566, 82 Am. D. 729; Kendrick v. O'Neil, 48 Ga. 631; Mullendore v. Wertz, 75 Ind. 431, 39 Am. R. 155; Haney & Campbell Mfg. Co. v. Adaza Creamery Co., 108 Ia. 313, 79 N. W. 79; Lane v. Owings, 3 Bibb (Ky.) 247; Mason v. Jouett's Admr., 2 Dana (Ky.) 107; McLellan v. Cumberland Bank, 24 Me. 566; Bradford v. Prescott, 85 Me. 482, 487; Shed v. Pierce, 17 Mass. 622; Durell v. Wendell, 8 N. H. 369; Benton v. Mullen, 61 N. H. 125; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; Catskill Bank v. Messenger, 9 Cow. (N. Y.) 37; Bank of Chenango v. Osgood, 4 Wend. (N. Y.) 607; Couch v. Mills, 21 Wend. (N. Y.) 424; Irvine v. Milbank, 15 Abb. Pr. (N. S.) 378. See also Solly v. Forbes, 2 B. & B. 38, 4 Moo. 448; Ashbee v. Piddock, 1 M. & W. 564.

56. Lacy v. Kynaston, *supra*; Dean v. Newhall, 8 Term R. 168; Dunn v. Slee, Holt (N. P.) 399; Shed v. Pierce, 17 Mass. 623; Wilson v. Foote, 11 Met. (Mass.) 623; Draper v. Weld, 13 Gray (Mass.) 580; Sherman Co. v. Nichols, 65 Neb. 251, 256; Mullendore v. Wertz, 75 Ind. 431, 39 Am. R. 155 and cases cited; *Ante*, sec. 236.

effect as an absolute release and the sureties, it seems, are discharged unless there is an express reservation of rights against them, or what is the same thing, an express reservation of their rights against the principal.⁵⁷ This rule is apparently based upon equitable considerations peculiar to the law of suretyship similar to those that are at the basis of the rule that treats the surety as released by the unauthorized giving of time to the principal without a reservation of rights; and the weight of authority appears to be the same way where the covenant is not to sue the principal for a limited time, for though the creditor may sue in either case, he is answerable, if he does so, for breach of his covenant, so that though his hands are not absolutely tied as in the case of an absolute release,⁵⁸ the covenant operates in terrorem, and it cannot be presumed that the creditor will sue in breach of it.⁵⁹ But as already stated, the reserve of remedies against the sureties will in all cases prevent a discharge of the sureties by a general release, and the same is true where there is a covenant not to sue, either generally or for a limited time. The principles which obtain here are the same as are applicable where there is an extension of time.⁶⁰ Where

57. Ante, sec. 241; *Mueller v. Doebischuetz*, 89 Ill. 176, 182; *Bateson v. Gosling*, L. R. 7 C. P. 9.

58. See *Thimbleby v. Barron*, 3 M. & W. 210; *Perkins v. Gilman*, 8 Pick. (Mass.) 229.

59. *Thimbleby v. Barron*, supra; *Owen v. Homan*, 3 Eng. Law & Eq. 112, 122, 123; *Herbert v. Dumont*, 3 Ind. 346, quoting *Owen v. Homan*, supra; *Austin v. Darwin*, 21 Vt. 38; *Forbes v. Sheppard*, 98 N. Car. 111 (covenant treated as an extension of time); *contra*, *Rucker v. Robinson*, 38 Mo. 154, 90 Am. D. 412. In this last case however the creditor reserved the right to sue whenever requested to do so by the sureties. See *Perkins v. Gilman*, supra; *Fullam v. Valentine*, 11 Pick. (Mass.) 155.

60. Ante, sec. 228, and cases cited; *Price v. Barker*, 4 El. & Bl. 760, 82 E. C. L. 760; *Ex parte Gifford*, 6 Ves. 805; *Maltsby v. Carstairs*, 7 B. & C. 735; *Thompson v. Lack*, 3 C. B. 540; *Wyke v. Rogers*, 1 D. M. & G. 408; *Close v. Close*, 4 D. M. & G. 176; *Green v. Wynn*, 4 Ch. 204; *Nevill's case*, 6 Ch. 43; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Muir v. Crawford*, L. R. 2 Sc. App. 456 (explaining *Webb v. Hewitt*, 3 K. & J. 438); *Rockville Bank v. Holt*, 58 Conn. 526, 18 Am. St. R. 293; *Mueller*

the covenant not to sue the principal is made in favor of a stranger, the sureties are not released.⁶¹

§ 243. Same—How Reservation of Rights Must be Made. Where the extension of time or release of the surety is by parol, the reservation of rights against the surety may likewise be by parol. But parol evidence of such reservation cannot be received where the extension or release is by a written instrument.⁶² It is not necessary for the surety to know that rights against him have been reserved or to consent to the reservation,⁶³ though the intention to reserve rights against him must fairly appear,⁶⁴ it may be gathered from the

v. Dobschuetz, 89 Ill. 176; *Boatmen's Bank v. Johnson*, 24 Mo. App. 316; *Kirby v. Turner*, Hopk. Ch. 309; *Lysaght v. Phillips*, 5 Duer. (N. Y.) 106. But see *Farmers' Bank v. Blair*, 44 Barb. (N. Y.) 641; *Stirewalt v. Martin*, 84 N. Car. 4. The release of the principal by the creditor will not exonerate the surety, if the latter, either before or at the time of such release, agrees to continue liable in spite of it. *Smith v. Winter*, 4 M. & W. 519; *Union Bank v. Beech*, 3 H. & C. 672; *Ex parte Harvey*, 23 L. J. Bankr. 26; *Davidson v. McGregor*, 8 M. & W. 755; *Rockville Bank v. Holt*, *supra*; *Osgood v. Miller*, 67 Me. 174; *Parsons v. Gloucester Bank*, 10 Pick. (Mass.) 533; *Hutchinson v. Wright*, 61 N. H. 108; *Bruen v. Marquand*, 17 Johns. (N. Y.) 58; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600. See however, *Eggeman v. Henschen*, 56 Mo. 123; *Broadway Bank v. Schmucker*, 7 Mo. App. 171.

61. *Frazer v. Jordan*, 8 El. & Bl. 303; *Clark v. Birley*, 41 Ch. D. 422.

62. *Mercantile Bank v. Taylor* (1893), App. Cas. 317; *Ex parte Glendenning*, Buck. 517; see *Miller v. Dobschuetz*, 89 Ill. 176.

63. *Webb v. Hewitt*, 3 Kay & J. 438.

64. See *Boultree v. Stubbs*, 18 Ves. Jr. 20; *Bateson v. Gosling*, 7 C. P. 9; *Owen v. Homan*, 3 Eng. Law & Eq. 112. "Expressly understood that the sureties are not released," following the signature of the principal in a release, held a sufficient reservation; *Mueller v. Dobschuetz*, 89 Ill. 176; see, also, *Kropidlowski v. Pfister & Vogel Leather Co.*, 149 Wis. 421.

Where the holders of indorsed notes at maturity gave new notes maturing later with the understanding that the old ones should be held as collateral until the new ones were signed by the indorsers, it was held insufficient as a reservation of rights. *Nat. Park Bank v. Koehler*, 204 N. Y. 274.

face of the instrument in connection with surrounding facts and circumstances.⁶⁵

§ 244. **Release of Prior Party to Commercial Paper as Release of Subsequent Party.** Where there are consecutive parties to commercial paper, an absolute release by the holder of a prior party releases all subsequent parties thereon,⁶⁶ and the same principle applies to the unauthorized giving of time,⁶⁷ though the rule of course implies that the party released, or to whom the extension is granted, must be one to whom the defendant could look for payment or indemnity in case he himself discharged the paper.

65. See *Mueller v. Dobschuetz*, *supra*; *Parmalee v. Lawrence*, 44 Ill. 405.

66. *English v. Darley*, 2 Bos. & P. 61; *Newcomb v. Raynor*, 21 Wend. (N. Y.) 108; *Curry v. Bank*, 8 Port. (Ala.) 360. Compare *Skilings v. Marcus*, 159 Mass. 51, decided under statute.

67. *English v. Darley*, *supra*; *Dey v. Martin*, 78 Va. 1; *Beacon Trust Co. v. Robbins*, 173 Mass. 261, 271, 274; *Shannon v. McMullen*, 25 Gratt. (Va.) 211.

CHAPTER XXIV.

LOSS OR SURRENDER OF SECURETIES BY CREDITOR.

§ 245. **Release of Securities—In General.** In discussing the general doctrine of subrogation with respect to sureties it has already been seen that a surety is entitled, in general, to the benefit of all securities held by the creditor from the principal debtor with respect to the debt for which the surety is bound. The creditor is, as to these, in the position of a trustee for the surety.¹ It follows as a corollary of this, that if the creditor intentionally surrenders or impairs such securities without the consent of the surety, or negligently loses or parts with them, his claim against the surety is reduced *pro tanto*, or may be wholly defeated, according to the value of the securities or the extent to which they are impaired;² and so, by the weight of authority, where they are lost by his want of ordinary care and diligence to perfect and preserve them.³ It is as immaterial in such cases,

1. Ante, secs. 133 *et seq.*; *Hampton v. Phipps*, 108 U. S. 260.

2. 1 *Brandt, Sur. & Guar.* (3rd Ed.), secs. 480, 481; *Pearl v. Deacon*, 24 Beav. 186, 3 Jur. N. S. 879; *Law v. East India Company*, 4 Vesey, 824; *Pledge v. Buss*, *Johnson*, 663; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Polak v. Everett*, L. R. Q. B. Div. 669 (1876); *Dunn v. Parsons*, 40 Hun (N. Y.), 77 and cases cited; *Smith & Erwin*, 77 N. Y. 466; *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. D. 311; *Nelson v. Munch*, 28 Minn. 314, 322; *Henderson v. Huey*, 45 Ala. 275; *Guild v. Butler*, 127 Mass. 386 and cases cited; *Pierce v. Atwood*, 64 Neb. 92; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119, 41 Am. D. 685 and authorities cited; *Brown v. Rathburn*, 10 Ore. 158; *Everly v. Rice*, 20 Pa. 297; *Lichtenthaler v. Thompson*, 13 Sarg. & R. (Pa.) 157, 15 Am. D. 581; *Plankinton v. Gorman*, 93 Wis. 560; *Price County Bank v. McKenzie*, 91 Wis. 658; and cases cited throughout this section. *Jones Pl. & Coll. Securities*, sec. 515; *Comp. Woodward v. Cleggs*, 8 Ala. 317.

3. Post, secs. 245 *et seq.*; *Dunn v. Parsons*, 40 Hun (N. Y.), 77; *Nelson v. Munch*, *supra*; *Bank of Phillipi v. Kittle*, 69 W. Va. 173, holding also that the defense of loss or impairment of securities is not merely equitable in its character so as to render it unavailing in a court of law. Compare *Holt v. Bodey*, 13 Pa. St. 207.

as it is to the right of subrogation, itself,⁴ that the surety, or the creditor, where he is the party seeking to enforce the right of subrogation, was ignorant of the existence of the security when he gave credit or became bound;⁵ or even, according to most authorities, that such securities were not taken until after the surety had signed,⁶ or that the creditor did not know of the suretyship at the time the securities were released.⁷

But the surety is not released where he consents to the discharge or impairment of liens or securities held by the creditor from the principal.⁸

A surety who has paid the creditor in ignorance of his release through surrender or loss of securities may recover back what he has paid as money paid under mistake,⁹ and the enforcement of a judgment against him will be perpetually enjoined, where securities were released without his consent after such judgment was rendered.¹⁰

§ 246. Extent to Which Surety Released if Securities Lost or Impaired. The extent to which the surety is released by the loss or impairment of securities depends, in general, upon the value of the securities and the terms

4. Ante, sec. 133.

5. *Lake v. Brutton*, 8 De G. M. & G. 440, 39 Eng. L. & Eq. 443; *Curtis v. Tyler*, 9 Paige (N. Y.), 432; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119, 7 Am. D. 478; *Matthews v. Aikin*, 1 N. Y. 595; *Hughes v. Littlefield*, 18 Me. 400.

6. Ante, sec. 135; 1 Brandt, Sur. & Guar. (3rd Ed), sec. 480; *Pledge v. Buss Johns*. (Eng. Ch.) 663; *Campbell v. Rothwell*, 47 L. J. Q. B. 144; *Willis v. Davis*, 3 Minn. 17; *Freaner v. Yingling*, 37 Md. 491; *Holland v. Johnson*, 51 Ind. 346; *Cummings v. Little*, 45 Me. 183; Ante, secs. 133, 134. Contra, *Newton v. Charlton*, 2 Drewry, 333.

7. *Holt v. Bodey*, 18 Pa. St. 207; *Irick v. Black*, 17 N. J. Eq. 189; *Martin v. Taylor*, 8 Bush (Ky.), 384, 386. See, also, *First Nat. Bank v. Cheney*, 114 Ala. 536, 548.

8. *Taylor v. Bank of N. S. Wales*, 11 App. Cas. 596; *Grisard v. Hanson*, 50 Ark. 229; *Brown v. Abbott*, 110 Ill. 162; *Pence v. Gale*, 20 Minn. 257. The fact that the surety knows that the creditor is about to release securities and remains silent is held not to affect his right to insist on his release *Polak v. Everett*, L. R. 1 Q. B. D. 669.

9. *Chester v. Kingston Bank*, 16 N. Y. 336.

10. *Evans v. Raper*, 74 N. Car. 639.

of his contract. If he signed upon the condition that certain securities were to be taken and retained by the creditor, their release will usually be treated as a material change in the contract, and he is wholly exonerated unless he consents;¹¹ otherwise he will be released to the extent (but to the extent only), of the value of the securities lost or surrendered.¹² He will be released, it seems, to this extent however, in spite of the fact that there remain other distinct securities ample for the payment of the debt.¹³ The burden of showing that the value of the securities released was less than the debt, however, or less at least than their face or nominal value, rests upon the creditor. If he has made the principals property unavailable to the surety, he should make clear that it was valueless or unavailable, at least beyond a specific amount.¹⁴

If securities are exchanged in good faith by the principal for other securities of equal or greater value, however, it seems that the surety is not released, unless it is part of the contract of suretyship that specified

11. 1 Brandt, Sur. & Guar. (3rd Ed.), sec. 483; *Polak v. Everett*, L. R. 1 Q. B. D. 699; *Prairie State Nat. Bank v. United States*, 164 U. S. 227, 235, 236, and authorities cited and reviewed. See *Lowe v. Reddan*, 123 Wis. 90.

12. *Capel v. Butler*, 2 Sim. & S. 457; *Pearl v. Deacon*, 24 Beav. 186, 1 De G. & J. 161; 1 Brandt, Sur. & Guar., supra; *Lowe v. Reddan*, supra, and numerous cases cited; *Vose v. Florida R. R. Co.*, 50 N. Y. 369; *State Bank v. Smith*, 155 N. Y. 185, 200; *Crim v. Flemming*, 101 Ind. 154; *North Ave. Sav. Bank v. Hayes*, 188 Mass. 835; *Everly v. Rice*, 20 Pa. 297. This has been held as to indorsers under the Negotiable Instruments Law of that state in spite of its general language. *State Bank v. Michel*, 152 Wis. 88.

13. *Holt v. Bodey*, 18 Pa. St. 207; see, also, *Dunn v. Parsons*, 40 Hun (N. Y.), 77. If the securities in question have a mere nominal value, however, the surety is still bound. *Loomis v. Fay*, 24 Vt. 240; *Blydenburg v. Bingham*, 38 N. Y. 371, 98 Am. D. 49; and in Missouri it appears that the release of a security will not release the surety where what is retained is ample for his indemnity. *Lafayette Co. v. Hixon*, 69 Mo. 581; *Saline County v. Buie*, 65 Mo. 63. See, also, *Scanland v. Settle*, Meigs (Tenn.), 169.

14. *Lewis v. Armstrong*, 80 Ga. 402; *Holt v. Bodey*, 18 Pa. St. 207; *Munroe v. De Forest*, 53 N. J. Eq. 364; *Moss v. Pettingill*, 3 Minn. 219. See *Dunn v. Parsons*, supra.

securities shall be taken and retained for the debt;¹⁵ and where the creditor's right to hold the securities in question was doubtful and they were surrendered in pursuance of a fair and reasonable compromise and the proceeds of such compromise were applied upon the debt, the liability of the surety was held not impaired.¹⁶

§ 247. Creditor Need not Seek or Actively Enforce Security. In spite of what has been said, the creditor is under no obligation in the absence of special contract to seek security from the principal, or to take active steps to renew or keep alive securities taken, or to realize upon them, at least where the surety may, by payment of the debt, become immediately subrogated to his right to enforce them or keep them alive for his own benefit.¹⁷ Thus, it has been held that the creditor is not bound to renew or revive a judgment to which, or the lien of which, the surety might have been subrogated upon payment,¹⁸ or to foreclose a mortgage or take possession of property subject thereto, unless he has specially agreed to exhaust the security before calling on the surety, or unless the duty to do so is imposed by the terms of his contract.¹⁹ Upon the same principle the creditor is not bound to levy an execution or attachment, and if he has sued it out he may abandon it at any

15. *Smith v. Trader's Nat. Bank*, 82 Tex. 368; *North Ave. Savings Bank v. Hayes*, 188 Mass. 135; *State Bank v. Smith*, 155 N. Y. 185, 200; *Young v. Cleveland*, 33 Mo. 126, 82-Am. D. 155; *Lafayette Co. v. Hixon*, 69 Mo. 581. But, see, *N. H. Bank v. Colcord*, 15 N. H. 119, 41 Am. D. 685, and *Neff's App.* 9 W. & S. (Pa.) 36. See, also, 37 Ill. App. 396.

16. *Bedwell v. Gephart*, 67 Ia. 44.

17. *Ante*, sec. 224; *Mayhew v. Crickett*, 2 Swanst. 185; *Freaner v. Yingling*, 37 Md. 491; *Fuller v. Tomlinson Bros.*, 58 Ia. 111; *State Bank v. Smith*, 155 N. Y. 185; *Rouss v. King*, 69 S. Car. 168; *Lumsden v. Leonard*, 55 Ga. 374.

18. *Campbell v. Sherman*, 151 Pa. St. 70, 31 Am. St. R. 735 and cases cited; *U. S. v. Simpson*, 3 Pen. & W. (Pa.) 439; *Kindt's Appeal*, 102 Pa. 221; *Mundorff v. Singer*, 5 Watts (Pa.), 172.

19. *Fuller v. Tomlinson*, 58 Ia. 111; *Griswold v. Hinson*, 50 Ark. 229; *Freaner v. Yingling*, 37 Md. 491; *Clopton v. Spratt*, 52 Miss. 251; *Sheldon v. Williams*, 11 Neb. 272; *Schroepell v. Shaw*, 3 N. Y. 446; *Howe Co. v. Farrington*, 82 N. Y. 121; *Day v. Elmore*, 4 Wis. 100.

time before it has become a lien upon the property of the debtor without affecting the liability of a strict surety or absolute guarantor, though it is otherwise where the lien of such process has already attached.²⁰ Upon similar principles a guarantor or surety is not released by the creditor's failure to file notice of mechanic's lien in time to preserve it.²¹

§ 248. Same—Failure to Record Mortgage. Upon the principle that the creditor is not bound for active diligence it has been held that a surety is not released by the creditor's failure to record a mortgage whereby the value of the security is lost or impaired.²² But the weight of reason and authority is the other way where the failure to record is negligent, for the creditor is in the attitude of a trustee of collaterals for the surety, once they are taken or arise, and is bound to exercise due and reasonable diligence to perfect and preserve them, though under no duty to seek them in the first instance or to actively enforce them, unless he has specially contracted to do so.²³ Clearly the surety would be released by the loss of a mortgage security through the failure of the creditor to record, where the surety became bound with the understanding that the mortgage security should be taken; and where fees were assigned by the principal to the creditor with the express under-

20. Ante, sec. 224, and cases cited in note 13; *City of Maquoketa v. Willey*, 35 Ia. 323; *Twigg v. Augusta Sav. Bank*, 26 S. Car. 612; *Bank of Missouri v. Matson*, 24 Mo. 333; *Ashby's Adm'x v. Smith's Ex'r.*, 9 Leigh (Va.), 164. If the creditor has commenced suit he may abandon it if no lien is thereby lost. His conduct in such case amounts to mere voluntary forbearance. *Sommerville v. Marbury*, 7 Gill. & J. (Md.) 275; *McVeigh v. Bank*, 26 Gratt. (Va.) 785.

21. *Davis v. McEwen Bros.*, 193 Fed. 315, 113 C. C. A. 229.

22. *Philbrooke v. McEwen*, 29 Ind. 347; *Wasson v. Hodshire*, 108 Ind. 26; *N. Y. Exch. Bank v. Jones*, 9 Daly (N. Y.), 248; *Hampton v. Levy*, 1 McCord Eq. (S. Car.) 107.

23. *Sheldon on Subrogation* (2nd Ed.), sec. 121; 1 *Brandt on Sur. & Guar.* (3rd Ed.), secs. 480, 505, and cases cited; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Capel v. Butler*, 1 Sim. & Stu. 457; *Burr v. Boyer*, 2 Neb. 265; *Toomer v. Dickerson*, 37 Ga. 428; *Teaff v. Ross*, 1 Oh. St. 469; *State Bank v. Bartle*, 114 Mo. 276; *Schroeppe v. Shaw*, 3 N. Y. 446.

standing that he was to collect and apply them on the debt, the surety was released where the creditor permitted the principal to collect them for his own use.²⁴

§ 249. **Miscellaneous Rules and Instances Touching Loss or Impairment of Securities.** If the securities lost or released were entirely worthless the surety is not relieved from liability to the creditor,²⁵ but the burden is upon the creditor to show their worthlessness to the surety.²⁶ It has been held, furthermore that a surety who holds a prior lien or mortgage on property of the principal is not released by the surrender of such property by the creditor to the principal where such surrender does not affect the value of such mortgage or his remedy against such property;²⁷ and so, if the creditor surrenders a disputed claim in favor of the principal as a fair and reasonable compromise.²⁸ If the creditor misapplies, or wastes or destroys²⁹ property held as security for the debt, or negligently permits it to be wasted, impaired or destroyed, however,³⁰ the surety is discharged

24. *Crim v. Fleming*, 101 Ind. 154, distinguishing *Philbrooke v. McEwen*, 29 Ind. 347; see, also, *Redton v. Heath*, 59 Kan. 255.

25. *Hardwick v. Wright*, 35 Beav. 133; *Rainbow v. Juggins*, 5 Q. B. D. 422; *Green v. Blunt*, 59 Ia. 79. This last case was a levy on exempt property released after timely objection by the principal.

26. *Ante*, sec. 246 and note 14; *Dunn v. Parsons*, 40 Hun (N. Y.), 77; *Moss v. Pettingill*, 3 Minn. 217. See *Comm. Bank v. Western Bank*, 11 Oh. 444, 38 Am. D. 639.

27. *Glass v. Thompson*, 9 B. Monr. (Ky.) 235; *Stringfellow v. Williams*, 6 Dana (Ky.), 236. But see *Thomas v. Nason*, 8 Col. App. 452.

28. *Bidwell v. Gephart*, 67 Ia. 44. See, also, *Coates v. Coates*, 33 Beav. 249, where the surety was held not discharged by the surrender of an insurance policy on the life of the principal, the principal being insolvent and the transaction beneficial to all parties concerned.

29. *Barrett v. Bass*, 105 Ga. 421; *Day v. Elmore*, 4 Wis. 214; *City Bank v. Young*, 43 N. H. 457.

30. *Fuller v. Tomlinson*, 58 Ia. 111; *Phares v. Barbour*, 49 Ill. 370; *Hall v. Hoxsey*, 84 Ill. 616.

If a creditor who holds a chose in action as collateral negligently fails to collect it the surety has been held released *pro tanto*. *Fennell v. McGowan*, 58 Miss. 261; *Kemmerer v. Wilson*, 31 Pa. 110; *Shippen v. Clapp*, 36 Pa. 89. In *Bank of Phillipi v. Kittle*, 69 W. Va. 171, the

pro tanto, and so, of course, if he misappropriates it alone or in collusion with the debtor.³¹

§ 250. **Same—Relinquishment of Lien Obtained by Legal Process.** When the creditor has obtained a lien by legal process, for a debt, a known surety for such debt is entitled to the benefit of such lien and is discharged to the extent of the value of it, where the creditor relinquishes it without his consent. This has been held in the case of a judgment lien,³² an execution lien,³³

surety was released by failure of the creditor to give notice that certain claims had been assigned to him by the principal whereby the benefit of them was lost.

The surety has been held discharged *pro tanto* by the failure of the holder of a note as collateral take steps to fix the liability of the indorsers, they being solvent and the maker insolvent. *City Bank v. Young*, 43 N. H. 457, 462. *Contra*, *Hungerford v. O'Brien*, 37 Minn. 306. *Contra*, as to delay in presenting a check, *Newman v. Kaufman*, 28 La. Ann. 825, 26 Am. R. 114. Where a surety sold chattels belonging to his principal and held for the debt, but the sale was so negligently conducted as not to realize their fair value, it was competent for the surety to show that they should have realized the whole debt. *Mutual Loan Assn. Fund v. Sudlow*, 5 C. B. (N. S.) 449; see, also, *Vose v. Florida R. Co.*, 50 N. Y. 369.

31. *Phares v. Barbour*, 49 Ill. 370; *Nichols v. Burch*, 128 Ind. 324; *Clopton v. Spratt*, 52 Miss. 251; *Vose v. Florida Co.*, 50 N. Y. 369; *Everly v. Rice*, 20 Pa. 297; *Sitgreaves v. Farmers' Bank*, 49 Pa. 359; *First Nat. Bank v. Wilbern*, 65 Neb. 247.

On the ground of his *quasi* trusteeship it has been held that a creditor selling securities of the principal can not be the purchaser at his own sale so as to affect the rights of sureties to have the full value of the property applied to their exoneration. *Phares v. Barbour*, *supra*.

32. *Mellish v. Green*, 5 Grant Ch. 655; *Dunn v. Parsons*, 40 Hun. (N. Y.), 77; *First Nat. Bank v. Parsons*, 42 W. Va. 137; *Jones v. Hawkins*, 60 Pa. 52. Where the creditor, having a judgment lien buys in the land and thus extinguishes the lien, the surety is discharged to the extent of the value of the land; *Wright v. Kneipper*, 1 Barr. (Pa.), 361; *Johnson v. Young*, 20 W. Va. 614.

33. *English v. Darley*, 3 Esp. 49, 50; *Mayhew v. Crickett*, 2 Sw. 185; *Wils. Ch.* 418; *Winston v. Yeargin*, 50 Ala. 340; *Mulford v. Estudillo*, 23 Cal. 94; *Thomas v. Wason*, 8 Colo. Ap. 452; *Houston v. Hurley*, 2 Del. Ch. 247; *Curan v. Colbert*, 3 Ga. 239, 46 Am. D. 427; *Fleming v. Odurn*, 59 Ga. 362; *Rawson v. Gregory*, 59 Ga. 733; *Brinton v. Gerry*, 7 Ill. App. 238; *Sterne v. Vincennes Bank*, 79 Ind. 549; *Sherraden v. Parker*, 24 Iowa, 28; *Green v. Blunt*, 59 Iowa, 79; *Alex-*

or a lien by attachment.³⁴

The release of the surety under the foregoing principles is not prevented by the fact that the lien in question was lost by the unauthorized act of the sheriff or other levying officer. His act is imputed to the principal, whose remedy is against the officer.³⁵

ander v. Bank, 7 J. J. Marsh. (Ky.) 580; Mt. Sterling Improvement Co. v. Cockrell, 24 Ky. L. 1151; Comstock v. Creon, 1 Rob. (La.) 528; Springer v. Toothaker, 43 Me. 381, 69 Am. D. 66; Chipman v. Todd, 60 Me. 282, 284; Moss v. Pettingill, 3 Minn. 217; Davis v. Mikell, Freeman. Ch. (Miss.) 548; Brown v. Kidd, 34 Miss. 291; Ferguson v. Turner, 7 Mo. 497; Mo. Bank v. Matson, 24 Mo. 333; Priest v. Watson, 75 Mo. 110; Bronson v. McCormick Co., 52 Neb. 342; Cooper v. Wilcox, 2 Dev. & B. Eq. (N. Car.) 90, 32 Am. D. 695n; Nelson v. Williams, 2 Dev. & B. Eq. (N. Car.) 118; Smith v. McLeod, 3 Ired. Eq. (N. Car.) 390; Dixon v. Ewing, 3 Ohio, 280, 17 Am. D. 590; Day v. Ramey, 40 Oh. St. 446; Com. v. Miller, 8 S. & R. (Pa.) 452; Com. v. Haas, 16 S. & R. (Pa.) 252; Bank v. Fordyce, 9 Pa. 275, 49 Am. D. 561; Holt v. Bodey, 18 Pa. 207; Templeton v. Shapley, 107 Pa. 370; Finley v. King, 38 Tenn. (Head.) 123; Watson v. Read, 1 Tenn. Ch. 196; Parker v. Nations, 33 Tex. 210; Jenkins v. McNeese, 34 Tex. 189; Baird v. Rice, 1 Call. (Va.) 18, 1 Am. D. 497; Johnson v. Young, 20 W. Va. 614; McKenzie v. Wiley, 27 W. Va. 658; Hyde v. Rogers, 59 Wis. 154. See, also, Griesmere v. Thorn, 32 Pa. Sup. Ct. 13; Morrison v. Hartman, 14 Pa. 55; Stephens v. Bank, 88 Pa. 157, 32 Am. R. 438.

It is frequently said in suretyship cases that a levy on personal property of the principal sufficient to satisfy the debt is a satisfaction of the debt, at least in the absence of some controlling circumstance. See Ante, sec. 190.

34. Maquoketa v. Willey, 35 Iowa, 323; Mo. Bank v. Matson, 24 Mo. 333; Spring v. George, 50 Hun (N. Y.), 227; Twiggs v. Augusta Bank, 26 S. Car. 612; Ashby v. Smith, 9 Leigh (Va.), 164; National Surety Co. v. Walker, 127 Ia. 518. But see contra, Concord Bank v. Rogers, 16 N. H. 9; Baker v. Davis, 22 N. H. 37; Barney v. Clark, 46 N. H. 514; Morrison v. Citizens' Bank, 65 N. H. 253, 23 Am. St. R. 39, 9 L. R. A. 282; Montpelier Bank v. Dixon, 4 Vt. 587, 24 Am. D. 640; Baker v. Marshall, 16 Vt. 522, 42 Am. D. 528. These cases, or most of them, apply the rule that the creditor is not bound for diligence against the principal on pain of losing recourse against the surety. See, also, Glazier v. Douglass, 32 Conn. 393, 400. In Morrison v. Bank, supra, there was attachment for the secured debt and then a second attachment of the same property for an unsecured debt due from the principal to the creditor. Held, that the creditor was entitled to apply the attached property to the unsecured debt without releasing the surety. See, also, Chipman v. Todd, 60 Me. 282 and cases cited.

35. Miller v. Dyer, 1 Duv. 363; Lumsden v. Leonard, 55 Ga. 374.

§ 251. **Release of Securities Held of Co-Surety.** In discussing the right of subrogation, we saw that if the creditor has or obtains security for the debt from one of several co-sureties, he holds it in trust for the others to enable them, upon payment to enforce their right of contribution against the surety from whom such security was derived.³⁶ It follows from this that if the creditor releases or wastes or impairs a security thus held or obtained, without the consent of his co-sureties, they are released to the extent that their right of contribution is prejudiced or impaired.³⁷

§ 252. **Creditor Inducing Surety to Believe Debt is Paid, or that Surety Would not be Called Upon—Estoppel.** If the creditor by his representations induces the surety reasonably to believe that the debt has been paid or discharged, when in fact it has not, and the surety in consequence of such belief omits to secure himself, or releases security already taken, or is otherwise injured, he is discharged. The creditor having caused the injury should suffer by it. He is estopped to enforce the obligation of the surety who has been thus induced to do some act or omit some precaution to his prejudice,³⁸ and it makes no difference that the creditor honestly believed that the debt had been paid.³⁹

36. Ante, secs. 133, 168.

37. *Baird v. Rice*, 1 Call (Va.), 18; *Dodd v. Winn*, 27 Mo. 501; *Rice v. Morton*, 19 Mo. 263; *Lower v. Buchanan Bank*, 78 Mo. 67; *Dobson v. Prather*, 6 Ired. Eq. (N. Car.) 31; *Margaretts v. Gregory*, 10 W. R. 630; see, also, *People v. Chesholm*, 8 Cal. 29; compare *Story v. Johnson*, 32 Ind. 438; *Chipman v. Todd*, 60 Me. 282 (attachment); *Alexander v. Byrd*, 85 Va. 690, holding that the release of a levy against a surety will not affect the liability of his co-sureties in any way.

38. *Thornburgh v. Marden*, 33 Ia. 380; *Bank v. Haskell*, 5 N. H. 116; *High v. Cox*, 55 Ga. 662; *Roberts v. Miles*, 12 Mich. 297; *Waters v. Creagh*, 4 Stew. & P. (Ala.) 410; *Atkins v. Payne*, 190 Pa. St. 5; *West v. Brison*, 99 Mo. 648; *Fehr Brewing Co. v. Mullican*, 23 Ky. L. 2100; *Kirby v. Landis*, 54 Ia. 150; *Reints v. Uhlenhopp*, 149 Ia. 284.

39. *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. D. 311; *Carpenter v. King*, 9 Met. (Mass.) 511, 43 Am. D. 405; *Atkins v. Payne*, *supra*.

Where a creditor's employee by mistake credited a debtor with

So where the creditor surrendered a note to the principal and knowledge of such surrender came to the surety thereon and he was thereby induced to believe that it had been paid, and was lulled into security and inaction as against his principal, he was held released though the original note was never shown to him, and its surrender was induced by the delivery to the creditor of another note to which the surety's name was forged.⁴⁰

It is clear, however, that the surety has no right to rely upon the mere statement of the principal that his obligation has been paid or discharged, or the evidence of debt surrendered.⁴¹ But where the evidence of debt was in fact surrendered by the creditor, and knowledge of such surrender came to the surety, it was held equivalent to a declaration by the creditor that it had been paid or satisfied in some way, and so though such knowledge was acquired from the principal.⁴²

Whether the surety is absolutely discharged from all liability in such cases, or only to the extent that he was actually injured, may not be clear. It has been held, however, under a statute providing for the discharge of a surety by conduct of the principal which injures his security, or exposes him to greater liability, or increases his risk, that the surety was absolutely discharged by the representations of the principal that the debt had been paid, and he knew nothing to the contrary for five years;⁴³ and where the creditor promises the surety that

a larger payment than he had made, and the mistake was not discovered until after the account was closed, the written guaranty thereof returned to the guarantor and the debtor had become insolvent, the guarantor was released; it being unnecessary for him to show that he would have acted before the debtor became insolvent had he known the true condition. *Marshall Field & Co. v. Sutherland*, 136 Ia. 218.

40. *Reints v. Uhlenhopp*, 149 Ia. 284, quoting *Kirby v. Landis*, 54 Ia. 150.

41. *Reints v. Uhlenhopp*, *supra*; *Sullivan v. Cluggage*, 21 Ind. App. 667; *Hier v. Harpster*, 76 Kan. 1, 13 L. R. A. (N. S.) 204.

42. *Reints v. Uhlenhopp*, *supra*.

43. *Whittiker v. Kirby*, 54 Ga. 277; see, also, *Hogahoom v. S. S.* 23

he will look solely to the principal, and the surety is thus induced to omit steps for his own protection until the principal becomes insolvent or securities are lost, the surety is discharged.⁴⁴

But a mere assurance by the creditor that the surety will not be called upon is not, in all circumstances, sufficient to release him. Such an assurance does not amount to a release or even to a contract, and unless the surety is induced in reliance thereon to release securities or to neglect his remedies he is not discharged.⁴⁵ Even where it does so the surety is not necessarily released. Thus, if, to induce the surety to sign, the principal assures him that he will not be called upon or that he will not be bothered, this is no more than an expression of an opinion against which the surety must be on his guard. In fact where one signs and delivers what purports to be a written contract of guaranty or suretyship oral evidence is inadmissible in the absence of fraud to show that it was agreed that no suretyship liability was intended,⁴⁶ or that it was to arise only upon a contingency,⁴⁷ and though such general statements or assurances are made and relied upon after default of the principal, the surety is not released unless they were of such character and made under such circumstances that the surety had a right, as a reasonable man, to rely upon them.⁴⁸

Herrick, 4 Va. 131; Bullard v. Ledbetter, 59 Ga. 109; Taylor v. Lohman, 74 Ind. 418; Brooking v. Farmers' Bank, 83 Ky. 431.

44. Bank v. Klingensmith, 7 Watts (Pa.), 523; Benbaker v. Okeson, 36 Pa. 519; Mahurip v. Pearson, 8 N. H. 539; Auchampaugh v. Schmidt, 77 Ia. 13; Taylor v. Lohman, *supra*. In Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. D. 254, the surety was held discharged though it did not appear that the principal had become insolvent. See, also, Security Savings Bank v. Smith, 144 Ia. 203.

45. Harmon v. Hale, 1 Wash. Ter. 422, 34 Am. R. 816; Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. D. 254; Wolf v. Madden, 82 Ia. 114.

46. Gumz v. Giegling, 108 Mich. 295; Geneser v. Weismer, 69 Ia. 119.

47. Miller v. Rigley, 22 Fed. 889.

48. Harris v. Brooks, *supra*; Michigan Ins. Co. v. Soule, 51 Mich. 312; Howe Machine Co. v. Farrington, 82 N. Y. 121.

CHAPTER XXV.

EFFECT OF JUDGMENT FOR OR AGAINST PRINCIPAL OR SURETY—ADMISSIONS OF PRINCIPAL OR SURETY.

§ 253. **Judgment in Favor of Principal as Discharge of Surety.** A judgment rendered in favor of the principal in an action based upon his alleged default, is a complete protection to the surety against liability for the same default;¹ not because of any direct estoppel against the creditor and in favor of the surety, but because the surety's obligation must stand or fall with that of the principal which is extinguished by the judgment.² This has been held though judgment was taken against the sureties, before judgment in favor of the principal was rendered.³

§ 254. **How far Adjudication Against Principal Binding on Surety or Evidence Against Him.** The cases on this subject are to a great extent inharmonious, and much often depends upon the form and character of

1. U. S. v. Allsburry, 4 Wall. (U. S.) 186; Drummond v. Prestman, 12 Wheat. (U. S.) 515; Baker v. Merriam, 97 Ind. 539; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176; Crum v. Wilson, 61 Miss. 233; Brown v. Bradford, 30 Ga. 927; Stoops v. Wittler, 1 Mo. App. 420, 422; Gill v. Morris, 58 Tenn. (Heisk.) 614, 27 Am. R. 744; Stevens v. Carroll, 131 Ia. 170. Contra, State Bank v. Robinson, 13 Ark. 214.

2. Jackson v. Griswold, 4 Hill (N. Y.), 522.

3. Ames v. Maclay, 14 Ia. 281, where the defense was availed of in equity. See, also, State v. Parker, 72 Ala. 181; State v. Coste, 36 Mo. 437, 88 Am. Dec. 148; Baker v. Merriam, 97 Ind. 539; Brown v. Bradford, 30 Ga. 927; Jones v. Kilgore, 2 Rich. Eq. (S. Car.) 63; Meichener v. Springfield, etc. Engine Co., 142 Ind. 130, 31 L. R. A. 59. A judgment in favor of the principal, however, on account of a defense not going to the validity or existence of the liability, but personal to the principal as in the case of infancy, coverture or bankruptcy, will not relieve the surety. Crum v. Wilson, 61 Miss. 233. Neither will such judgment avail a guarantor who, from the form and circumstances of the guaranty is to be regarded as warranting that the principal contract is a valid subsisting obligation. See Holm v. Jamieson, 173 Ill. 295, 45 L. R. A. 846; Ante, sec. 49.

the surety's undertaking. Where the surety has, by the express or implied terms of his contract, agreed to abide by the result of litigation against his principal, a judgment against the latter is quite uniformly held to conclude him in the absence of fraud or collusion.⁴ As the surety has contracted so is he bound. Guardianship bonds⁵ and the bonds of executors and administrators are usually construed to be of this character,⁶ and so, frequently, are strictly official bonds,⁷ and certain undertakings given in the course of judicial proceedings.⁸ In other cases, however, by the apparent weight of authority a judgment against the principal, while not conclusive as against the surety, is *prima facie* evidence of the fact and extent of his liability, though he was not a party to the action and had no notice thereof or opportunity to defend.⁹ The ground of this rule is not en-

4. *Stovall v. Banks*, 10 Wall. (U. S.) 583; *Patton v. Caldwell*, 1 Dall. (U. S.) 419; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Methodist Churches v. Baker*, 18 N. Y. 463; *Massers v. Strickland*, 17 Serg. & R. (Pa.) 354, 17 Am. D. 668; *Lewick v. Norton*, 51 Conn. 461; *McMicken v. Com.*, 58 Pa. 213; *Carmack v. Com.*, 5 Bin. (Pa.) 184; *Towle v. Towle*, 46 N. H. 431; *Mitchell v. Toole*, 63 Ga. 93; *Fay v. Edmiston*, 25 Kan. 439; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98; *Crawford v. Turk*, 24 Gratt. (Va.) 176; *Meyer v. Barth*, 97 Wis. 352, 65 Am. St. R. 124, and cases cited; *Pacewalk v. Bollmann*, 29 Neb. 519, 26 Am. St. R. 399; *Riddle v. Baker*, 13 Cal. 295.

5. Post, sec. 342.

6. Post, sec. 331.

7. Post, sec. 272.

8. Post, secs. 281, 287, 292, 299. See *Wanack v. People*, 187 Ill. 116; *Com. v. Baxter*, 235 Pa. St. 179, 183; 1 *Freem. on Judgments*, sec. 180.

9. *Jones, Adm'x v. Williams*, 10 L. J. N. S., Exch., 120, 123; *Duffield v. Scott*, 3 T. R. 374; *McLaughlin v. Bank*, 7 How. (U. S.) 220, 229; *Drummond v. Prestman*, 12 Wheat. 515; *Charles v. Hoskins*, 14 Iowa, 471, 83 Am. D. 378n; *Lyon v. Northrup*, 17 Iowa, 314; *Dane v. Gilmore*, 51 Me. 544, 551, 555; *Iglehart v. State*, 2 Gill & Johns. (Md.) 235, 245; *Train v. Gold*, 5 Pick. (Mass.) 380; *Tracy v. Goodwin*, 5 Allen (Mass.), 409; *City of Lowell v. Parker*, 10 Met. (Mass.) 309, 315, 43 Am. D. 436; *Barker v. Wheeler*, 60 Neb. 470, 83 Am. St. R. 541; *Westervelt v. Smith*, 2 Duer (N. Y.), 449; *Annett v. Terry*, 35 N. Y. 256; *Fay v. Ames*, 44 Barb. (N. Y.) 327; *State v. Woodside*, 7 Ired. (N. C.) 296; *State v. Colerick*, 3 Ohio, 487; *Westhaven v. Olive*, 5 Ohio, 136; *Huzzard v. Nagle*, 40 Pa. St. 178; *Evans v. Commonwealth*,

tirely clear. The reasons commonly urged for it are founded upon notions of privity and upon the fact that a judgment in favor of the principal being conclusive in favor of a surety, a judgment against him should be admissible against the surety as *prima facie* evidence at least.¹⁰

Upon stronger reasoning the surety should be concluded, *prima facie* at least, where he had notice of the proceeding against his principal and an opportunity to defend.¹¹

A number of cases hold, however, that where the surety or guarantor is not a party or privy to the action against the principal, and has no notice and opportunity to defend, a judgment or decree against the principal is, as to the surety, *res inter alios acta*, and is not even admissible in evidence against him unless the terms of his undertaking are such that he may be regarded as contracting in advance to be bound by such judgment or decree.¹²

In a few states, however, it seems that an adjudication against the principal is conclusive evidence of his default in a subsequent action against his surety.¹³

8 Watts (Pa.), 398; *Eagles v. Kern*, 5 Wharton (Pa.), 144; *Webbs v. State*, 44 Tenn. (Coldw.) 199, 200; *Atkins v. Baily*, 17 Tenn. (Yerger), 111; *Stephens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793n; *Grafton v. Hinkley*, 111 Wis. 46, 54, 55.

10. See *Drummond v. Prestman*, *supra*; *Mitchell v. Toole*, 63 Ga. 93.

11. *Henry v. Heldmaier*, 226 Ill. 152.

12. *Ex p. Young*, 17 Ch. Div. 668; *Giltinan v. Strong*, 64 Pa. 242; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *DeGrieff v. Wilson*, 30 N. J. Eq. 435; *Hobson v. Yancey*, 2 Gratt. (Va.) 73; *Lucas v. Governor*, 6 Ala. 826; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Pico v. Webster*, 14 Cal. 205; *Jackson v. Griswold*, 4 Hill (N. Y.), 522; *McConnell v. Poor*, 113 Ia. 133, 52 L. R. A. 312; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. D. 98; *Ballantine & Sons v. Fenn*, 84 Vt. 117, 40 L. R. A. (N. S.) 698 and note.

13. See *Jaynes v. Platt*, 47 Oh. St. 262, 21 Am. St. R. 810; *Brown v. Pike*, 74 N. Car. 531; *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. R. 742; *Treweek v. Howard*, 105 Cal. 434; *Mitchell v. Toole*, 63 Ga. 93; *Tracy v. Goodwin*, 5 Allen (Mass.), 409; *Dennie v. Smith*, 129 Mass. 143. Compare *City of Lowell v. Parker*, 10 Met. (Mass.) 309, 315, 43

§ 255. **How far Judgment Against Surety Binds Principal or Co-Surety.** If principal and surety are sued together, or the surety notifies the principal in season to enable him to defend or to furnish the surety with a defense, the recovery against the surety is the measure of his recovery against the principal, and is conclusive against the latter in an action for reimbursement, assuming that the surety has paid the full amount of the judgment.¹⁴ This rule of course presupposes that there is no collusion between the surety and the creditor, and no negligence on the part of the surety in using the defenses at his command.¹⁵ If the principal had no notice and opportunity to defend, however, he may, in an action for indemnity by the surety, show that such judgment ought not to have been obtained.¹⁶

Similar principles obtain where a surety is seeking contribution against his co-surety, and a judgment against him is conclusive, in like manner, against a co-surety who has been notified in season to participate in the defense.¹⁷ If the surety seeking contribution was sued alone, however, and his co-sureties had no notice of the action or opportunity to defend, the judgment is, by the weight of authority, *prima facie* evidence of the fact and amount

Am. D. 436. See *Thomas v. Markmann*, 43 Neb. 823, and *Lewis v. Mills*, 47 Neb. 910. Some of these decisions are influenced by statutes, or result from the conditions of the surety's undertaking.

14. *Tarleton v. Tarleton*, 4 M. & S. 20; *Smith v. Compton*, 3 B. & Ad. 407; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. D. 759; *Rice v. Rice*, 14 B. Monr. (Ky.) 335; *Hare v. Grant*, 77 N. Car. 203; *Konitzky v. Meyer*, 49 N. Y. 571; compare *Riley v. Stallworth*, 56 Ala. 481 decided under statutes.

15. *Hare v. Grant*, *supra*.

16. *Cathcart v. Foulke*, 13 Mo. 561; *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. D. 619; *Lowndes v. Pinckney*, 1 Rich. Eq. (S. Car.) 155; *Kramph v. Hatz*, 52 Pa. 525; *Mahin v. Bull*, 13 S. & R. (Pa.) 441; and see *Dampskibsskateselskabet Habil v. U. S. Fid. & Guar. Co.*, 142 Ala. 363.

17. *Love v. Gibson*, 2 Fla. 598; *Rochelle's Heirs v. Bowers*, 9 La. 528; *Leak v. Covington*, 99 N. Car. 559, 563; *Comstock v. Keating*, 115 Mo. App. 372.

of their liability to the surety who has paid it,¹⁸ though some courts hold such judgment inadmissible upon principles already stated.¹⁹

§ 256. How far Judgment in Favor of Surety Protects Principal. A judgment on the merits in favor of both principal and surety in an action against them jointly of course protects both. If they interpose separate defenses, however, judgment may go in favor of the surety and against the principal. Still, if the surety is sued alone, a judgment in his favor based upon the non-existence of the principal liability would seem to be prima facie evidence at least in favor of the principal debtor.

§ 257. How far Statements and Admissions of Principal Binding on or Admissible Against Surety. How far the statements or admissions of the principal are admissible against or binding on the guarantor or surety has been the subject of some doubt and controversy. Generally, where both principal and surety are sued together upon a joint or joint and several obligation, a declaration or admission of the principal, competent as against him, is also competent against the surety, and this has been held though several judgments are sought against the joint defendants under statutes permitting them.²⁰

The question has arisen, however, chiefly under bonds and contracts guaranteeing the fidelity of officers, agents and servants, how far the admissions or declarations of the principal are admissible as against the surety or guarantor in an action against him alone. Generally the admission or declaration of the principal while

18. 2 Brandt, Sur. & Guar. (3rd Ed.), sec. 807; Babcock v. Carter, 117 Ala. 575, 67 Am. St. R. 193n; Preslar v. Stallworth, 37 Ala. 402; (compare Means v. Hicks, 65 Ala. 241); Miller v. Pitts, 152 N. Car. 629, and cases cited; Briggs v. Boyd, 37 Vt. 534; Breckenridge v. Taylor, 5 Dana (Ky.), 110; Koelsch v. Mixer, 52 Oh. St. 207 (semble).

19. Ante, sec. 254, note 12, and cases cited; Glasscock v. Hamilton, 62 Tex. 143; Fletcher v. Jackson, 23 Vt. 581, 56 Am. D. 98; see Ruff v. Montgomery, 83 Miss. 185.

20. Singer Mfg. Co. v. Reynolds, 168 Mass. 588, 60 Am. St. R. 117 and cases cited.

in the discharge of his guaranteed duties, and with respect to them, are competent. Whether they are admissible because they are of the *res gestae*, or because of privity of obligation, or upon both grounds, we will not stop to inquire, though the former ground is the one usually given and relied upon. The rule itself is well settled, and it seems equally well settled that declarations of the principal made before the surety became bound or after the guaranteed employment has wholly ceased, though with respect thereto, are incompetent against his surety in an action for the principal's defaults therein, being regarded generally, so far as the principal is concerned, as mere hearsay.²¹ Upon the foregoing principles the statements or admissions of a²² lessee after his term had expired or of an administrator after his administration was closed²³ were held inadmissible against his surety.

Where, however, it is the duty of an officer, whether by law or under the terms of his bond, to account with the public authorities or his successor in office, his statements and admissions in the course of such accounting, and relative thereto, are admissible against his sureties though his term of office has expired.²⁴

21. *Lewis v. Lee County*, 73 Ala. 480; 1 Greenl. Ev. (16th Ed.), sec. 187; with which compare 2 Wigm. Ev., sec. 1077 and the extended discussion in both the majority and dissenting opinions in *United Am. Fire Ins. Co. v. Am. Bonding Co.*, 146 Wis. 673 and note thereto in 40 L. R. A. (N. S.) 661. See, also, *Guarantee Co. v. Phoenix Ins. Co.*, 124 Fed. 170, 39 C. C. A. 187 U. S. 650; 2 Brandt, Sur. & Guar. (3rd Ed.), secs. 794, 775, *et seq.*; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. R. 231; *Montgomery v. Dillingham*, 3 S. & M. (Miss.) 647; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Manger v. Knowles*, 67 Ill. 325; *Paxton v. State*, 59 Neb. 460, 80 Am. St. R. 689; compare *The Treasurers v. Bates*, 2 Bail. L. 362; *Mead v. McDowell*, 5 Bin. (Pa.) 195.

22. *Ayer v. Getty*, 46 Hun (N. Y.), 287.

23. *Lacoste v. Bexar County*, 28 Tex. 420.

24. *Father Matthew, etc., Soc. v. Fitzwilliam*, 12 Mo. App. 445, 84 Mo. 406; *Paxton v. State*, 50 Neb. 460, 80 Am. St. R. 689; *Jenness v. Black Hawk*, 2 Col. 578. See, also, *United Am. Fire Ins. Co. v. Am. Bonding Co.*, 146 Wis. 573, 40 L. R. A. (N. S.) 661, including the dissent of Kerwin, J.

The books of account kept by the principal in the course of the guaranteed employment, or entries made or accounts or statements submitted by him in the course thereof, are admissible against the surety, under the rule first stated²⁵ but as *prima facie* evidence merely.²⁶

The effect of an admission, new promise or part payment by one promisor to raise the bar of the statute of limitations as against his co-promisor, whether principal or surety, has already been considered.²⁷

25. *State Bank v. Johnson*, 1 Mills (S. Car.), 404, 12 Am. D. 645; *State Bank v. Brown*, 165 N. Y. 216; *Lancashire Ins. Co. v. Callaghan*, 68 Minn. 277, 64 Am. St. R. 475; *Paxton v. State*, 59 Neb. 460, 80 Am. St. R. 689, and cases in the next note below. The rule applies against the surety of a deceased principal as to entries made in the course of official duty. *Grass v. Walington*, 6 Moo. 355.

26. *United States v. Boyd*, 5 How. (U. S.) 29; *Supreme Council v. Fidelity, etc. Co.*, 63 Fed. 48; *Supervisors v. Bristol*, 99 N. Y. 316; *Bissell v. Saxton*, 66 N. Y. 55; *Lowry v. State*, 64 Ind. 421; *Hatch v. Attshorough*, 97 Mass. 533; *McShane v. Howard Bank*, 73 Md. 135, 10 L. R. A. 552; *Mann v. Yazoo Bank*, 31 Miss. 574; *State v. Newton*, 33 Ark. 276; *Bank of Brighton v. Smith*, 12 Allen (Mass.), 243. Compare *Morley v. Metamora*, 78 Ill. 394, 20 Am. R. 266; *Longan v. Taylor*, 130 Ill. 412, and *Post*, sec. 271, as to the conclusiveness of the accounts of public officers.

27. *Ante*, sec. 205.

CHAPTER XXVI.

OFFICIAL BONDS.

§ 258. **In General—Of Whom Required.** While political, judicial, military and naval officers are seldom required to give security for the faithful performance of their duties, public fiscal and ministerial officers are usually required to give bonds with sureties for the protection of the public and individuals against the consequences of their malfeasances and nonfeasances in office. The giving of such bonds was never a requirement of the common law, but of statutes creating the office, prescribing the qualifications of the holder or the conditions under which he may be inducted thereto or retained therein, and the officer is liable for breach of his official duty whether a bond be given or not.¹ Every bond required by statute to be executed by an officer is an official bond, and must be regarded as such in the construction of any statute relating to such bonds.²

§ 259. **Construction of Official Bonds.** The obligation of private sureties on official bonds is usually held to be *strictissimi juris* and cannot be extended by implication beyond the plain import of the language employed.³ The bonds of incorporated surety companies, issued for a consideration, however, have been held to be in the nature of policies of insurance to be construed reasona-

1. *Coie v. Dallmeyer*, 101 Mo. 37.

2. See *Murfree*, *Off. Bonds*, sec. 65; *Com. v. Adams*, 3 Bush. (Ky.) 43, 46; *Anderson v. Thompson*, 73 Ky. 132; *Faurote v. State*, 110 Ind. 463. As to the distinction between public officers and other employees of or contractors with the government, see *United States v. Maurice*, 2 Brock. (U. S.) 96; *Board v. Goldsboro*, 90 Md. 193. See, also, *Attorney Genl. v. McCaughrey*, 21 R. I. 341; *State v. Stanley*, 66 N. Car. 69; *Board v. Goldsboro*, 90 Md. 193.

3. *Murfree*, *Off. Bonds*, sec. 710 *et seq.*; *Meachem on Pub. Off.*, sec. 78, and authorities cited; *Mason v. Commissioners*, 104 Ga. 34.

bly yet liberally in favor of the obligees, even where the principal is a public officer.⁴ In any case, however, all statutory provisions relative to an official bond necessarily enter into and become a part of it the same as if written therein.⁵

§ 260. Bond of De Facto Officer Valid—Estoppel. If one is actually inducted to public office and exercises the functions thereof, it is no defense to an action against the sureties on his bond that from the circumstances of his election or appointment he is an officer *de facto* and not *de jure*.⁶ Indeed sureties upon the bond of a public officer are ordinarily held estopped by the very form and fact of their undertaking after he has exercised the powers or privileges thereof, to show that he has not qualified for the office,⁷ or was not duly elected or appointed thereto.⁸

§ 261. How far Surety's Liability Dependent Upon Form of Bond. The statutes almost invariably prescribe, with more or less particularity, the forms and conditions of official bonds. As the statutory requirements are meant more for the protection of the public than for that of the officer or his sureties, and substance is more to be regarded than form, it is usually held that unless the statute prescribing the form of an official bond clearly provides that it shall be void unless it contains certain conditions, or is executed in a certain way, the statute

4. *Forest County v. Dawley*, 149 Wis. 323; *Mayor, etc. of Brunswick v. Harvey*, 114 Ga. 733; *Bryant v. Am. Bonding Co.*, 76 Oh. St. 253. *Compare State v. Fidelity & Dep. Co.*, 88 Md. 111; *Ante*, sec. 93.

5. *State v. McFetridge*, 84 Wis. 473, 500, 20 L. R. A. 223; *Lowe v. City of Guthrie*, 4 Okla. 287.

6. *Com. v. Teal*, 14 B. Monr. (Ky.) 29; *Weston v. Sprague*, 54 Vt. 395; *Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. D. 300; *People v. Slocum*, 1 Idaho, 62; compare *Olds v. The State*, 6 Blackf. (Ind.) 91. See *In re Norton*, 64 Kan. 842, 91 Am. St. R. 255.

7. *Ante*, sec. 49; *Post*, sec. 316; *Mechem, Pub. Off.*, sec. 296; *Anderson v. Jokett*, 14 La Ann. 614.

8. *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 179.

will be construed as directory merely, and a substantial compliance with its requirements is all that is necessary to render it valid, at least as a common law obligation.⁹

The effect of the failure of the principal or some of the sureties named in the bond to execute it has already been discussed in treating of conditional and unauthorized execution and delivery.¹⁰

§ 262. Same—Statutes Requiring Bond to be Approved or Filed—Other Requirements. Statutes frequently require that official bonds be examined and approved by some public officer before they are accepted. The duty of the latter is a public duty prescribed for the protection of the public and not of the principal or his sureties. It is therefore well settled that where, by virtue of the bond, the officer has been inducted to the office, his sureties cannot escape liability on the ground that the bond was not approved by the proper officer, or in the proper manner,¹¹ or was not approved at all,¹²

9. *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. D. 566; *U. S. v. Bradley*, 10 Pet. (U. S.) 343. See, as to various informalities, *Mechem*, Pub. Off., sec. 269; *Lowe v. City of Guthrie*, 4 Okla. 287. That the bond contains more than the law requires does not render it invalid so far as it complies with statutory requirements unless the excessive conditions were inserted under duress. *Lowe v. City of Guthrie*, supra; *Milwaukee v. U. S. Fid. & Guar. Co.*, 144 Wis. 603; *State v. Purcell*, 31 W. Va. 44, and cases cited and discussed. Statutes frequently provide that official bonds shall not be void by reason of any irregularity in their execution. See *Perkins Co. v. Miller*, 55 Neb. 141; *State v. Smith*, 87 Miss. 551.

10. See Ante, sec. 45; *Empire State Sur. Co. v. Carroll Co.*, 194 Fed. 593, 114 C. C. A. 435, holding the surety bound in spite of the principal's failure to execute the bond, for acts or omissions for which the principal would be liable without a bond, where the surety caused or permitted it to be delivered.

11. *People v. Johr*, 22 Mich. 461; *Sproul v. Lawrence*, 33 Ala. 674; *Auditor v. Woodruff*, 2 Ark. 73, 33 Am. D. 368; *Holt Co. v. Scott*, 53 Neb. 176.

12. See *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. R. 177 and cases cited in the note thereto in 90 Am. St. R. 89; *People v. Edwards*, 9 Cal. 286; *McCracken v. Todd*, 1 Kan. 148; *People v. Wardwell*, 17 Ill. 278, 63 Am. D. 366; *Young v. State*, 7 Gil. & J. (Md.)

and the same rule applies where there is a failure to record or file the bond as required by law. These statutes are directory and not mandatory, and while noncompliance may affect the principal's right to hold the office it does not affect the liability of the obligors on the bond.¹³ So, on similar principles, if sureties on an official bond are required by statute to be residents of the state or county, they are estopped to show, where the bond has been accepted, that they are in fact nonresidents.¹⁴

§ 263. Voluntary Bonds or Undertakings. By a voluntary bond is meant one not required by law. By the apparent weight of authority such a bond, if given without compulsion or extortion, is binding as a common law obligation, unless it is in some way contrary to law or public policy.¹⁵ It has been held in a few cases, however, that such a bond is void for want of consideration.¹⁶

If the bond is exacted, however, without authority of law as a condition of allowing the officer to take possession or to exercise the duties of the office to which he has a right without a bond, it is not a voluntary bond but is deemed to be obtained under a species of duress

253. That there can be no delivery of an official bond until it has been approved by the proper authority, see *People v. Van Ness*, 79 Cal. 84, 12 Am. St. R. 134; *City of Evansville v. Morris*, 87 Ind. 269, 44 Am. R. 763. Compare *Est. of Ramsay v. People*, 177, 191 note.

13. *McLean v. Buchanan*, 53 N. Car. 444; *Chicago v. Gage*, 95 Ill. 593, 35 Am. R. 182.

14. *Board of School Directors v. Braun*, 33 La. Ann. 383; *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. R. 209, 16 C. C. A. 498; *State v. Flinn*, 77 Ala. 100; see *Leidigh v. Pribble*, 64 Neb. 860 (1902). The fact that the sureties on an official bond fail to justify does not relieve them of liability. *Taylor Co. v. King*, 73 Ia. 153, 5 Am. St. R. 666; *State v. McDonald*, 40 Pac. (Idaho) 312.

15. *Jessup v. U. S.*, 106 U. S. 147; *Moses v. U. S.*, 166 U. S. 571; *U. S. v. Bradley*, 10 Pet. (U. S.) 343; *Board v. Coffinburg*, 1 Mich. 354; *State v. Sooy*, 38 N. J. L. 324; *Com. v. Wolbert*, 6 Bin. (Pa.) 292, 6 Am. D. 452; *State v. Harney*, 57 Miss. 863; *Hoboken v. Harrison*, 30 N. J. L. 73; *State v. Neibling*, 6 Oh. St. 40.

16. *State v. Bartlett*, 30 Miss. 634; *State v. Husey*, 56 Ia. 404; *Sullivan v. People*, 64 Pac. (Col. App.) 1049.

and is void;¹⁷ and so if the bond exacted contains excessive penalties.¹⁸

§ 264. Scope of Surety's Liability—Bond Covers Official Acts Only—What Acts Deemed Official. The sureties on the bonds of public officers are liable for official misconduct only, and not for unofficial acts or acts done in a purely private capacity or for omissions to perform or discharge purely private or unofficial duties.¹⁹ Upon this principle a constable who receives money from a judgment debtor to stay execution and give time to perfect an appeal, acts in a purely private capacity, and though he may be personally liable for the loss or conversion of it, the sureties on his official bond are not;²⁰ and so as to the proceeds of goods sold after attachment under a private arrangement with the sheriff, whereby he was to sell the goods and pay over the proceeds without order or process as prescribed by law;²¹ and where a county judge accepted moneys deposited with him by a guardian whose trust had terminated, the bondsmen of the judge were not liable for them as it was no part of such judge's official duty to receive such funds, and he was deemed to act in a purely private capacity.²²

An act done in an official capacity may be done, (1)

17. *U. S. v. Tingley*, 5 Pet. (U. S.) 115; *U. S. v. Humason*, 6 Sawy. (U. S.) 199; *Lowe v. City of Guthrie*, 4 Okla. 287. But the office must be one that the officer has a legal right to hold and enjoy without a bond, so that its exaction may be said to amount to extortion. See *Moses v. U. S.* 166 U. S. 571, distinguishing *U. S. v. Tingley*, *supra*.

18. *U. S. v. Tingley*, *supra*.

19. *Greenberg v. People*, 225 Ill. 174; *State v. Conover*, 4 Dutch. (N. J. L.) 224, 78 Am. D. 54; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. R. 751; *Governor v. Perrine*, 23 Ala. 807; *Brown v. Phipps*, 14 Miss. (6 S. & M.) 51; *Com. v. Swope*, 45 Pa. 535, 84 Am. D. 518; *Am. Bonding Co. v. Blout*, 23 Ky. L. 1632; *Feller v. Gates*, 40 Ore. 543, 91 Am. St. R. 492.

20. *Feller v. Gates*, *supra*.

21. *Governor v. Perrine*, *supra*.

22. *Am. Bonding Co. v. Blount*, 23 Ky. L. 1632. So generally as to funds that it is no part of the duty legal of the officer to receive. *Ward v. Stahl*, 81 N. Y. 406; *People v. Tompkins*, 74 Ill. 482; *Lowe v. City of Guthrie*, 4 Okla. 287, 300 and cases cited.

by virtue of office—*virtute officii*; or (2) by color of office—*colore officii*. Acts of the first class are such as are within the scope of the officer's authority, and if he performs them negligently, or abuses the confidence which the law places in him, his sureties are liable by all the authorities. Acts of the second class are such as his office gives him no lawful power to perform, and if he does perform them in such a way as to invade the rights of others, many authorities hold that his sureties are not liable therefor, in spite of the fact that he assumed to act in his official capacity.

The question of liability for acts *virtute officii* and *colore officii* has been most frequently raised where a sheriff, constable or other officer authorized to levy upon property under legal process, levies upon exempt property, or upon the property of a stranger to the process or writ. A few states hold that the sureties are not liable in such cases, upon the ground that the act of the levying officer is justified neither by his official character nor his writ, and that his act constitutes a mere voluntary and unauthorized trespass involving him in purely personal risk or responsibility.²³ By the decided weight of recent authority, however, the sureties are liable in such cases, on the ground that they undertake that their principal will well and faithfully execute the duties of his office and that he cannot be deemed to do so when, in his capacity of sheriff or constable, he levies upon exempt property or the property of a stranger, or arrests without warrant or upon process void on its face.²⁴

23. *State v. Conover*, 4 Dutch. (N. J. L.) 224, 78 Am. D. 54; *State v. Brown*, 11 Ired. (N. Car.) 141; *Herdinheimer v. Brent*, 59 Tex. 533; *Comp. Hillman v. Carroll*, 27 Tex. 23, 84 Am. D. 606; *Gerber v. Ackley*, 32 Wis. 233, 37 Wis. 43, 19 Am. R. 751; *Taylor v. Parker*, 43 Wis. 78. See also *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *McKee v. Griffin*, 66 Ala. 211; *Renfroe v. Colquitt*, 74 Ga. 618; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State*, 34 Ind. 105; *Brown v. Mosley*, 11 Smedes & M. (Miss.) 354.

24. *Lammon v. Feusier*, 111 U. S. 17, reviewing or citing many authorities; *Van Pelt v. Littler*, 14 Cal. 194; *Charles v. Haskins*, 11

It has been held, however, even where acts done under color of office are distinguished from acts done by virtue of office and bondsmen are only liable for the latter, that where a judge entitled to pay for certain extra services had rendered and collected upon fictitious bills for services not actually performed, his bondsmen were liable. The bond, however, was conditioned not merely that the principal should faithfully perform the duties of his office, but that he should "account for all moneys coming into his hands by *reason* of his holding such office." The decision, however, it was affirmatively stated, was not made to turn upon that point.²⁵

§ 265. Sureties for Judicial Officers—Liability for Ministerial and Judicial Acts. Generally a judicial officer acting within his jurisdiction is not civilly liable for his official acts if they are of a judicial, rather than a merely administrative or ministerial character, regardless of the motive with which he acted or the presence or absence

Iowa, 329, 77 Am. Dec. 148; *Horan v. People*, 10 Ill. App. 21; *Greenberg v. People*, 225 Ill. 174; *Commonwealth v. Stockton*, 5 T. B. Mon. (Ky.) 192; *Jewell v. Mills*, 3 Bush (Ky.), 62; *Archer v. Noble*, 3 Greenl. (Me.) 418; *Harris v. Hanson*, 2 Fairf. (Me.) 241; *Turner v. Sisson*, 137 Mass. 191; *Greenfield v. Wilson*, 13 Gray (Mass.), 384; *Tracy v. Goodwin*, 5 Allen (Mass.), 409; *People v. Mersereau*, 74 Mich. 687, 42 N. W. 153; *State v. Moore*, 19 Mo. 369, 61 Am. D. 563; *Turner v. Killian*, 12 Neb. 580; *Noble v. Himeo*, 12 Neb. 193; *People v. Schuyler*, 4 N. Y. 173, which doubtless overrules earlier decisions in that state. *Mayor v. Sibberns*, 3 Abb. App. 266; *Cumming v. Brown*, 43 N. Y. 514; *Lee v. Charmley*, N. Dak., 33 L. R. A. (N. S.) 275 and note. See *People v. Lucas*, 93 N. Y. 585, distinguishing *People v. Schuyler*; *State v. Jennings*, 4 Ohio St. 418. See also *Hubbard v. Elden*, 43 Ohio St. 380; *Stephenson v. Sinclair*, 14 Tex. Civ. App. 133; *Carmack v. Commonwealth*, 5 Binn. (Penn.) 513; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Sangster v. Commonwealth*, 17 Gratt. (Va.) 124; *Mace v. Gaddis*, 3 Wash. 125, 13 Pac. 545; *United States v. Hine*, 3 McAr. (D. C.) 27. As to the right of a sheriff or other levying officer to demand an indemnifying bond as a condition of executing process in doubtful cases and the liabilities of the sureties and the duties and rights of the officer where such bonds are given, see *Alderson, Judicial Writs*, § 180, and cases cited and discussed.

25. *Forest County v. Dawley*, 149 Wis. 323; see, also, *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. R. 783; *Am. Bonding Co. v. Blount*, 23 Ky. L. 1632.

of malice. The remedy for official misconduct in the discharge of judicial duties is confined, on grounds of public policy, solely to impeachment, or to impeachment and criminal prosecution.²⁶

Without inquiring closely what acts are judicial rather than ministerial it must suffice to say that the sureties on the bond of a judicial officer for the faithful performance of his official duties are liable, in the absence of statute, only to the extent that he is himself civilly liable, or for ministerial acts only;²⁷ save that for judicial acts done wholly without jurisdiction, the officer may be liable civilly.

The issuance of execution when required by law has been held a ministerial act,²⁸ and the same has been held of the granting of a writ of habeas corpus,²⁹ or an order of arrest, or requiring proper security thereon.³⁰

The taking of an acknowledgment by a justice of the peace has been held to be a judicial act, though his sureties were held liable on the ground that his issuance of a certificate which was wholly false as to privy examina-

26. See Cooley on Torts (2nd Ed.), 472, *et seq.*; Meachem, Pub. Off., sec. 619, *et seq.*; Bradley v. Fisher, 13 Wall. (U. S.) 335; Pratt v. Gardner, 56 Mass. (6 Cush.) 63, 48 Am. D. 652; People v. Bartels, 138 Ill. 322.

27. Place v. Taylor, 22 Oh. St. 317; McLendon v. Mortgage Co., 119 Ala. 518; Larson v. Kelly, 64 Minn. 51; Brockett v. Martin, 11 Kan. 378.

An act has been said to be judicial "where it is the result of judgment or discretion. Where the officer has the right to hear and determine the rights of persons or property, or the propriety of doing an act, he is vested with judicial power. . . . Official duty is ministerial when it is absolute, imperative and certain, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." People v. Bartels, 138 Ill. 322.

28. Head v. Levy, 52 Neb. 456; Baker v. Morgan, 5 Ky. L. 323; Fairchild v. Keith, 29 Oh. St. 156; contra, Wertheimer v. Howard, 30 Mo. 420, 77 Am. D. 623.

29. Nash v. People, 36 N. Y. 607.

30. Place v. Taylor, 22 Oh. St. 317; see, also, as to what acts are ministerial.

tion of a married woman was a gross usurpation of jurisdiction.³¹

§ 266. Sureties for Principal in One Office not Bound for His Defaults in Another. Ordinarily sureties for the principal's defaults in a particular office are not bound for his defaults as incumbent of another and different office.³² Thus, the sureties of a clerk of the court are not liable for his defaults when acting as receiver,³³ nor are the sureties of a sheriff liable for his acts as trustee.³⁴ But where the incumbent of an office for the discharge of the duties of which bonds have been given is ex officio charged with the duties of some other office at the time when the bond is given, his sureties in the first office are liable for his defaults in the second,³⁵ unless a separate bond is required for the discharge of his duties in the latter.³⁶

§ 267. Sureties Answerable for Defaults of Deputies. The sureties on the bond of a public administrative, executive or ministerial officer are liable for the defaults of his deputies with respect, at least, to official duties owing by such officer to individuals, as these are imputed to the principal.³⁷ Public officers, however, may

31. *McLennon v. Am. etc. Co.*, 119 Ala. 518.

32. *State v. Odom*, 86 N. Car. 432; *Syme v. Bunting*, 91 N. Car. 48; *Kerr v. Brandon*, 84 N. Car. 129; *Wilmington v. Nutt*, 80 N. Car. 265; *Cooper v. People*, 85 Ill. 417; *State v. Davis*, 88 Mo. 585; *Waters v. Carroll*, 9 Yerg. (Tenn.) 102; *Williams v. Bowman*, 3 Head (Tenn.), 681; *State v. Blakemore*, 7 Heisk. (Tenn.) 638; *Hammer v. Kaufman*, 39 Ill. 87; *Milwaukee Co. v. Ehlers*, 45 Wis. 281. See, also, Post, sec. 274, as to change in official duties.

33. *State v. Odom*, supra.

34. *State v. Davis*, 88 Mo. 585.

35. *Mechem, Pub. Off.*, sec. 285; *Van Valkenburg v. Patterson*, 47 N. J. L. 46; see *Satterfield v. People*, 104 Ill. 448.

36. *Cooper v. People*, 85 Ill. 417; *Jones v. Montfort*, 20 N. Car. 73; *Columbia Co. v. Massie*, 31 Ore. 292.

37. *Mechem, Pub. Officers*, sec. 797; *Asher v. Cabell*, 50 Fed. 818, 1 C. C. A. 693; *Thomas v. Kinkead*, 55 Ark. 503, 29 Am. St. R. 68, 15 L. R. A. 558; *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. R. 416, 54 L. R. A. 220; *Hixton v. Cove*, 5 Okla. 545; *Brown v. Weaver*, 76 Mass. 7, 71 Am. St. R. 512, 42 L. R. A. 423.

usually exact bonds from their deputies, and the sureties of an official principal who are compelled to answer for the defaults of his deputies are subrogated to his rights thereon against such deputies and their sureties.³⁸

§ 268. How far Sureties Liable for Loss of Public Funds—Majority Views—Interest. The cases touching the liability of both principal and sureties on official bonds for loss of the public funds coming to the hands of the principal may be divided into two general classes:

1. Those that hold the principal and his sureties absolutely liable for such loss regardless of diligence or want of it on the part of the principal, either as debtors or insurers.

2. Those that hold the principal and his sureties liable only where the loss is due to the bad faith, dishonesty or want of reasonable care and skill on the part of the principal.

The first, which is the majority rule, is not always based upon the same reasoning. It is urged in support of it by one line of authorities, that the principal, having bound himself to deliver or pay over the public funds, he and his sureties are bound by their solemn agreement in this regard though such payment is prevented by circumstances over which the principal has no control. If they desired to assume a more restricted liability, they should have stipulated for it.³⁹ Other courts have based their decisions on the ground, alone or together with

38. *Brinson v. Thomas*, 2 Jones Eq. (N. Car.) 414, 67 Am. D. 224, *Ballock v. Peake*, 3 Jones Eq. (N. Car.) 323; *Griggs v. Huston*, 14 Lea (Tenn.), 233; *Nebergall v. Tyree*, 2 W. Va. 474.

39. *U. S. v. Prescott*, 3 How. (U. S.) 578; *State v. Moore*, 74 Mo. 413, 41 Am. R. 322, and cases cited; *Union Township v. Smith*, 39 Ia. 9, 18 Am. R. 39 and cases cited; *State v. Owens*, 86 Minn. 188, 91 Am. St. R. 336, and cases cited and reviewed; *Ward v. School Dist.*, 15, 10 Neb. 293, 35 Am. R. 477; *Oneida v. Thompson*, 92 Hun (N. Y.), 16, 37 N. Y. Supp. 889; *State v. Wood*, 51 Ark. 205; *Bush v. Johnson County*, 48 Neb. 1, 32 L. R. A. 223, 58 Am. St. R. 673; *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. R. 177, and cases cited. See also *Fld. Dep. Co. v. State*, 98 Md. 162; *Swift v. Trustees*, 189 Ill. 184.

that just stated,⁴⁰ that public policy requires that every depositary of public money be held to a strict accountability, as any other rule would lead to fraud and impunity on the part of public officials.⁴¹ Other decisions sustaining the rule of strict liability maintain that by direct or indirect force of the statutes the officer becomes in effect a debtor as to funds received in virtue of his office, and is no more excused from discharging such indebtedness by reason of accident or misfortune than is any other debtor.⁴²

Pursuant to the strict views just referred to, a county treasurer has been held liable for moneys lost through the failure of a bank, though the bank was reputed solvent and the deposit was necessary to the safety of the fund,⁴³ or was sanctioned by usage.⁴⁴ So where a school district treasurer's bond was conditioned for the faithful performance of his duties according to law, he and his sureties were held liable though the moneys received by him were consumed by fire without want of care or diligence on his part,⁴⁵ and so where a county treasurer

40. *United States v. Prescott*, 3 How. (U. S.) 578; *Commissioner v. Lineberger*, 3 Mont. 231, 35 Am. R. 462.

41. *United States v. Prescott*, 3 How. (U. S.) 578; *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L. R. A. 678, 56 Am. St. R. 612; *Cameron v. Hicks*, 65 W. Va. 484, 17 Ann. Cas. 926; *State v. Harper*, 6 Oh. St. 607, 67 Am. D. 363, and note. The fact that moneys are abstracted by a deputy appointed under civil service rules does not excuse the officer or his sureties. *U. S. v. Bryan*, 82 Fed. 290, 90 Fed. 473, 33 C. C. A. 617.

42. *Boggs v. State*, 46 Tex. 10; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Mecklenberg Co. v. Beals*, 111 Va. 691, 36 L. R. A. (N. S.) 285; *Hancock v. Hazzard*, 12 Cush. (Mass.) 112; *Muzzy v. Shattuck*, 1 Denio (N. Y.), 233; *Looney v. Hughes*, 26 N. Y. 514; *Inhabitants of Colrain v. Bell*, 9 Met. (Mass.) 499; *Shelton v. State*, 53 Ind. 331, 21 Am. R. 197; *State v. Wilsen*, 17 Col. 170; *Com. v. Godshaw*, 92 Ky. 435; *State v. Clarke*, 73 N. Car. 255. See also *U. S. Fid. & Guar. Co. v. Fossati*, 97 Tex. 497.

43. *Estate of Ramsay v. People*, 179 Ill. 572, 90 Am. St. R. 177; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322.

44. *Mecklen County v. Beals*, 111 Va. 691, 36 L. R. A. 285.

45. *Union Township v. Smith*, 39 Ia. 9, 18 Am. R. 39; *Clay Co. v. Simonsen*, 1 S. Dak. 403.

was robbed by force,⁴⁶ and where a safe provided by the county was rifled without his fault.⁴⁷

§ 269. **Same—Minority View.** A few courts maintain in accordance with what appears to have been the common-law rule, that a public officer, as to public moneys, is in the nature of a bailee for hire, at least where he simply undertakes to faithfully discharge the duties of his office, and is bound only for the exercise of good faith and reasonable skill and diligence in the discharge of his trust.⁴⁸ Even under this view, if the principal deposits public moneys in his own name without anything to distinguish them as public funds, or otherwise mingles them with his personal funds so that they are indistinguishable, he is no doubt absolutely liable;⁴⁹ otherwise he and his bondsmen are not liable where he has been robbed without his fault,⁵⁰ or where the bank in which he has deposited public funds has failed, unless

46. *State v. Nevin*, 19 Nev. 162, 3 Am. St. R. 873; *State v. Harper*, 6 Oh. St. 607, 67 Am. D. 363.

47. *Commissioners v. Lineberger*, 3 Mont. 231, 35 Am. R. 462; to the same effect see *County Commissioners v. Jones*, 18 Minn. 189.

48. *City of Healdsburg v. Mulligan*, 113 Cal. 205; *Cumberland Co. v. Pennell*, 69 Me. 357, 31 Am. R. 284; *York County v. Watson*, 15 S. Car. 1, 40 Am. R. 675; *Livingston v. Woods*, 20 Mont. 91; *Overton Co. v. Copeland*, 96 Tenn. 296, 31 L. R. A. 844, 54 Am. St. R. 840; *Fentress Co. v. Reed*, 116 Tenn. 110, 7 L. R. A. (N. S.) 1084; *State v. Gramm*, 7 Wyo. 329, 40 L. R. A. 690; see also *U. S. v. Thomas*, 15 Wall. (U. S.) 337, where a collector of public moneys was held not liable where it was forcibly taken by the public enemy without his fault. See also *Lamb v. Dart*, 108 Ga. 602; *U. S. v. Humason*, 6 Sawy. (U. S.) 99; *Thompson v. Board*, 30 Ill. 99. A few cases that adhere to the strict rule of liability as to public funds adopt the rule of diligence merely as to private funds though held by the officer pursuant to his official duty, as in the case of funds belonging to unknown heirs and the like. *Gartley v. People*, 28 Col. 227; *People v. Faulkner*, 107 N. Y. 477. In many cases holding the officer strictly accountable this distinction is not observed or indeed suggested, and in at least one has been repudiated. *Northern Pac. R. Co. v. Owens*, 86 Minn. 188, 57 L. R. A. 634, 91 Am. St. R. 336.

49. See *United States v. Thomas*, 15 Wall. (U. S.) 344. This is the general rule as to all fiduciaries and requires no further citation of authority.

50. *Cumberland v. Pennell*, 69 Me. 357, 31 Am. R. 284.

he knew or ought to have known that it was insolvent or unsafe.⁵¹

It seems clear that both the officer and his bondsmen are liable for legal interest on all sums that he is legally liable to pay over, from the time he is in default in paying them over pursuant to law, unless statutes establish a different rule.⁵² But where interest is realized on public funds while lawfully in the hands of a public fiscal officer the liability of the officer and his bondsmen therefor has occasioned considerable difficulty. Under the view that he is neither a bailee nor a trustee, but an absolute debtor, the interest on such funds has been held to belong to him, and he and his bondsmen were not liable therefor.⁵³ Most of the decisions, however, are the other way, though their reasoning is not always the same, and many of them are influenced by statutes.⁵⁴

§ 270. Time of Default for Which Sureties Liable. Sureties for an officer elected or appointed for a definite term are liable only for defaults occurring during that term, unless they have expressly assumed a greater responsibility, and not for any prior or subsequent term unless they have signed as sureties therefor;⁵⁵ nor are they liable for moneys that should have been in his hands at the commencement of the term for which they are bound but which in fact were converted during a prior term.⁵⁶

51. *York County v. Watson*, 15 S. Car. 1, 40 Am. R. 675.

52. See *State v. McFetridge*, 84 Wis. 473, 528, 20 L. R. A. 223.

53. *Shelton v. State*, 53 Ind. 331, 21 Am. R. 197; *State v. Walsen*, 17 Colo. 170, 15 L. R. A. 456n; *Com. v. Godshaw*, 92 Ky. 435. See, also, *Renfroe v. Colquitt*, 74 Ga. 618, where the same result was reached by reasoning that the act of investing the public money being illegal and penal, the interest was received by color and not by virtue of office.

54. See *State v. McFetridge*, 84 Wis. 473, 524, 20 L. R. A. 223, and cases cited; 1 Brandt, Sur. & Guar., secs. 635, 638; *Supervisors of Richmond Co. v. Wandell*, 6 Lans. (N. Y.) 33.

55. *Mechem*, Pub. Off., sec. 286, and cases cited; *Saunders v. Taylor*, 9 Barn. & C. 35; *Phillips v. McGrath*, 117 Ala. 549; *First Nat. Bank v. Samuelson*, 82 Neb. 532; and see cases throughout this section, and in the note to *Crawn v. Com.*, 84 Va. 282, 10 Am. St. R. 839.

56. *Vivian v. Otis*, 24 Wis. 518, 1 Am. R. 199, and cases cited. See Post, sec. 271, as to the conclusiveness of principal's accounts.

Even where the statute declares that the officer shall hold for a stated term or until his successor shall be elected, his sureties are not liable for defaults occurring after the expiration of the term, and after a reasonable time has elapsed for the election and qualification of his successor.⁵⁷ The condition for the election or appointment of another officer, however, is satisfied by the re-election or reappointment of the same officer, and the sureties for his first term are not bound for defaults occurring during the subsequent term unless, of course, they are parties to both the old and the new bonds.⁵⁸ Where the term of office embraces more than one year, however, and the law requires the filing of a new bond annually, the several bonds filed pursuant thereto are deemed cumulative and the sureties thereon are liable *pro rata*.⁵⁹ In the absence of any showing as to the time when default actually occurred, it will be presumed to have taken place during the last term and the sureties for that term are liable unless they can rebut this presumption.⁶⁰ But

57. *Mayor of Rahway v. Crowell*, 11 Vroom (N. J. L.), 207, 29 Am. R. 224; *State Treasurer v. Mann*, 34 Vt. 371, 80 Am. D. 688; *Chlemsford Co. v. Demarest*, 7 Gray (Mass.), 1; *Napello Co. v. Bingham*, 10 Ia. 39, 74 Am. D. 370; *Supervisors of Omro v. Kaime*, 39 Wis. 463; *Trustees v. Cowden*, 240 Ill. 39.

If a definite period of appointment to office is recited in the bond, or is fixed by statute, mere general words indicating a liability beyond such period will not render the sureties liable beyond the original term of appointment or election. *First Nat. Bank v. Briggs*, 69 Vt. 12, 60 Am. St. R. 922, and cases cited and discussed. See, also, *County of Scott v. Ring*, 29 Minn. 398; *First Nat. Bank v. Samuelson*, 82 Neb. 532, 535 and cases cited; *Dumphy v. Whipple*, 25 Mich. 10; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. R. 830, 19 L. R. A. 500.

58. *Citizens Loan Assn. v. Nugent*, 11 Vroom (N. J. L.), 215, 29 Am. R. 230.

59. *Jones v. Hayes*, 3 Ired. Eq. (N. Car.) 502, 44 Am. D. 78; *Moore v. Boudinot*, 64 N. Car. 190.

60. *Pine County v. Willard*, 39 Minn. 125, 12 Am. St. R. 622; *Kelley v. State*, 25 Oh. St. 567; *Heppe v. Johnson*, 73 Cal. 265; *Independent School Dist. v. Hubbard*, 110 Ia. 58, 80 Am. St. R. 271. Where it is left uncertain upon the whole evidence during which term the default occurred, it has been said that equity will apportion the loss among the several sets of sureties. *State v. Churchill*, 48 Ark. 426; *Phippsburg v. Dickinson*, 78 Me. 457.

though sureties for one term are not responsible for defaults occurring in a prior one, if public moneys coming to him in his second term are actually used by him to make good a default in such prior term, and are received from him in good faith, the sureties for the second term are liable.⁶¹ But where an officer properly pays over money actually received in a given term, the government officers cannot apply it, even with the consent of the principal, in discharge of a default occurring during a prior term, so as to render liable the sureties for the subsequent term.⁶² But sureties for a subsequent term are liable for misappropriation of public funds received during a prior term, if they were in the officer's hands at the beginning of the term for which they become bound.⁶³

§ 271. How far Officers Accounts Competent or Conclusive Against His Sureties. It is held by some authorities that the accounts, statements and reports of public officers made pursuant to their official duty, as to the amount of moneys in their hands at a given time, are not only admissible but are conclusive both upon them

61. *Pine Co. v. Willard*, *supra*; *Crawn v. Com.*, 84 Va. 282, 10 Am. St. R. 839n; *Rogers v. State*, 99 Ind. 218; *Inhabitants of Hudson v. Miles*, 185 Mass. 582, 102 Am. St. R. 370. See, also, *Stone v. Seymour*, 15 Wend. (N. Y.) 20. Though moneys are borrowed to settle the accounts of a prior term, the sureties for a second term are liable for cash received during the second term and used to pay up such loan. *Independent School Dist. v. Hubbard*, 110 Ia. 58, 80 Am. St. R. 271.

62. *United States v. Irving*, 1 How. (U. S.) 250; and to the same effect, see *United States v. January*, 7 Cranch (U. S.), 572; *Jones v. United States*, 7 How. (U. S.) 688; *Meyers v. U. S.*, 1 McLean, 495; *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. D. 291; *Boring v. Williams*, 17 Ala. 525; *Porter v. Stanley*, 47 Me. 518; *Postmaster-General v. Norvell*, Gilpin, 106; *State v. Middleton*, 57 Tex. 185. But in *Postmaster-General v. Furber*, 4 Mason (U. S.), 333, and *United States v. Wardwell*, 5 Mason, 82, Story J. questions the effect of the decision in *United States v. January*, 7 Cranch, 572, *supra*, and to the case in 5 Mason appends a long note in explanation of his views.

63. *United States v. Boyd*, 15 Pet. (U. S.) 187; *Board of Education v. Fonda*, 77 N. Y. 350. *Contra*, *Snider v. Alexander*, 31 Oh. St. 378.

and upon their sureties.⁶⁴ By the weight of authority, however, while the official accounts, statements and reports of a public officer are admissible against his sureties to show what he received and when he received it, they are only *prima facie* evidence of such facts, and they may nevertheless show that defalcations, apparently during the term for which they are bound, in fact took place during a prior term.⁶⁵

§ 272. How far Judgment Against Official Principal Concludes His Sureties. The general rules governing this subject have already been stated.⁶⁶ So far as public officers are concerned the prevailing rule seems to be that while a judgment against the principal does not bind his sureties absolutely unless they agree to be bound thereby under the conditions of their bond, it is *prima facie* evidence against them and will control until overcome by countervailing evidence.⁶⁷ Other authorities hold the judgment against an official principal conclusive upon

64. See *Cowden v. Trustees*, 235 Ill. 604; *Doll v. People*, 145 Ill. 253, and cases cited; *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. R. 60; *Moreley v. Matamora*, 78 Ill. 394; *Baker v. Preston*, 1 Gilm. (Va.) 235 (with which compare *Crawford v. Turk*, 24 Gratt. (Va.) 176); *State v. Grammer*, 29 Ind. 551; *Boone Co. v. Jones*, 54 Ia. 699, 37 Am. R. 229 and cases cited and reviewed. A bill in equity will not be entertained to correct the accounts of the officer to show that funds were embezzled in prior years. *Cowden v. Trustees*, *supra*.

65. *United States v. Boyd*, 5 How. (U. S.) 29; *Bissell v. Saxton*, 66 N. Y. 55; *Vivian v. Otis*, 24 Wis. 518, 1 Am. R. 199; *State v. Smith*, 26 Mo. 226, 72 Am. D. 204; *Barry v. Screwmens Benevolent Assn.*, 67 Tex. 250; *Coleman v. Pike Co.*, 83 Ala. 326, 3 Am. St. R. 746, 748 and note; *Lowry v. State*, 64 Ind. 421; Ind. R. S., sec. 6507 (1888).

66. *Ante*, chap. 25.

67. *Moses v. U. S.*, 166 U. S. 571 and cases cited; *City of Lowell v. Parker*, 10 Met. (Mass.) 309, 43 Am. Dec. 436; *Graves v. Bueckley*, 25 Kan. 249, 37 Am. R. 249; *Fay v. Edmiston*, 25 Kan. 439, 37 Am. R. 252 note, and note to *Rodine v. Lytle*, 52 L. R. A. 170 *et seq.*; *Charles v. Hoskins*, 14 Ia. 471, 83 Am. D. 378; *Mullen v. Scott*, 9 La. Ann. 173; *Taylor v. Johnson*, 17 Ga. 521; *Treasurer v. Temples*, 2 Bailey (S. Car.), 362; *Atkins v. Baily*, 9 Yerg. (Tenn.) 111; *Fulton v. Colerick*, 3 Ohio, 487. See, also, *State v. Smith*, 95 N. Car. 396, decided under statute; *State v. Jennings*, 14 Oh. St. 73.

the sureties,⁶⁸ while still others hold that such judgment is not even admissible against them,⁶⁹ unless the sureties were notified of the proceeding in which such judgment was obtained and had an opportunity to defend.⁷⁰

§ 273. Alteration in Official Bond. Material alteration of an official bond, after its execution and without the consent of the sureties thereon, discharges it.⁷¹ Even where the alteration took place before the surety signed, he was held not liable where he had no knowledge of it at the time of its execution, but the fact was known to the obligee.⁷²

§ 274. Change in Official Duties or Compensation. While a material change in the duties of a private servant or agent usually discharges his nonconsenting sureties, the same rule is usually held not to apply in the case of public officers, and an alteration, addition or diminution of the duties of a public officer, or a change in his emoluments, made by the legislature, does not discharge his official bond or the sureties thereon so long as the duties required are all of them appropriate func-

68. *Masser v. Strickland*, 17 Serg. & R. (Pa.) 354, 17 Am. D. 668; *Giltinan v. Strong*, 64 Pa. St. 242; *Fay v. Ames*, 44 Barb. (N. Y.) 327; *Tracy v. Goodwin*, 5 Allen (Mass.), 409; *Dane v. Gilmore*, 51 Me. 544; *Dennie v. Smith*, 129 Mass. 143; *Pacewalk v. Bollman*, 29 Neb. 519.

69. *Lucas v. The Governor*, 6 Ala. 826; *Rodini v. Lytle*, 17 Mont. 448, 52 L. R. A. 165 and notes; *Pico v. Webster*, 14 Cal. 203, 73 Am. D. 647; *Bailey v. Butterfield*, 14 Me. 112; *McKellar v. Howell*, 4 Hawks (N. Car.), 34; *McDowell v. Burwell*, 4 Rand. (Va.) 317 (compare *Munford v. Overseers*, 2 Rand. (Va.) 313); *Beal v. Beck*, 3 Har. & M. (Md.) 242; *Tuthill v. Russell*, 25 Hun (N. Y.), 524, and cases cited; *Fay v. Ames*, 44 Barb. (N. Y.) 327 distinguishing *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. D. 619.

70. *Douglas v. Howland*, 24 Wend. (N. Y.) 35; *Jackson v. Griswold*, 4 Hill (N. Y.), 522; *Carmichael v. Governor*, 3 How. (Miss.) 236; compare *Pico v. Webster*, *supra*.

71. *Smith v. U. S.*, 2 Wall. (U. S.) 219; *Com. v. Holmes*, 25 Gratt. (Va.) 771; *State v. Chick*, 146 Mo. 645; *Dome v. Eldridge*, 16 Gray (Mass.), 254; *State v. Craig*, 58 Ia. 238.

72. *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735. See on the general subject of release by alteration of official bonds, *Mechem, Pub. Off.*, sec. 304.

tions of the particular office; and this is so, though no provision authorizing such change is found in the bond or in the law under which it was given.⁷³ The reasoning of the courts in such cases is that the legislature has power at all times to change the duties of public officers, the existence of this power is known to the officer and his sureties, the officer accepts the office and the sureties execute the bond with this knowledge, and may therefore be held to consent in advance to such changes in the duties of the principal as are fairly compatible with the original nature of the office itself.⁷⁴ If a change, however, though by legislative enactment, is such as to alter the essential character of the office and its accompanying risks, the sureties are not bound for subsequent defaults unless they have consented to be liable. The changes usually held to be of this character are enlargement of the term of office, or of its territorial jurisdiction.⁷⁵ But where there has been a change of a material character by the imposition of duties foreign to the

73. *Skillett v. Fletcher*, L. R. 1 C. P. 217; *National Surety Co. v. U. S.*, 129 Fed. 70; *People v. Vilas*, 36 N. Y. 459, 93 Am. D. 520, and 525, and note; *Governor v. Ridgeway*, 12 Ill. 14; *Compher v. People*, 12 Ill. 290; *People v. Tomkins*, 74 Ill. 482; *Smith v. Peoria County*, 59 Ill. 412; *Denio v. State*, 60 Miss. 949; *Loving v. Auditor*, 76 Va. 942. See, also, *Swan v. State*, 48 Tex. 120; *Brown v. Sneed*, 77 Tex. 471; *Milwaukee v. U. S. Fid. & Guar. Co.*, 144 Wis. 603. Compare *Pybus v. Gibbs*, 6 E. & B. 902, 26 L. J. Q. B. 41, 88 E. C. L. 902; *State ex rel. Bay v. Holman*, 96 Mo. App. 193.

74. See *People v. Vilas*, *supra*; *Gaussen v. U. S.*, 97 U. S. 584; *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771; *State v. Swinney*, 60 Miss. 39, 44, 45 Am. R. 405n; *Territory v. Carson*, 7 Mont. 417. If the statute enlarging the duties of a public officer provides for a special bond to secure the discharge of the added duties, the sureties on the special bond are alone liable for breach of such new duties unless the liability of the general bondsmen is expressly preserved. *Morrow v. Wood*, 56 Ala. 1; *Milwaukee County v. Ehlers*, 45 Wis. 281; *People v. Backus*, 117 N. Y. 196; *Mayor, etc. v. Kelley*, 98 N. Y. 467, 50 Am. R. 699.

75. *Miller v. Stewart*, 9 Wheat. (U. S.) 702; *National Surety Co. v. U. S.*, 129 Fed. 70; *Brown v. Latimore*, 17 Cal. 93; *Prairie v. Worth*, 78 N. Car. 169; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. R. 880, 19 L. R. A. 500; *State v. Swinney*, 60 Miss. 39, 45 Am. Rep. 405; *Loving v. Auditor*, 76 Va. 942, 948.

original nature of the office, the sureties are nevertheless liable for the performance of its original duties.⁷⁶

A change in the compensation of the public officer without the consent of his sureties does not discharge them. There is no contract relation between the state and its officers to be impaired by such change and the sureties are deemed to have signed with reference to the legislative power to alter or reduce the compensation of their principal.⁷⁷

§ 275. Extension of Time for Accounting. It is held by one line of authorities that inasmuch as the bonds of official collectors of public moneys are given with full knowledge of the right of the legislature to alter the time for the collection thereof and a settlement of the collector's accounts, and statutes fixing the time of settlement are for the protection of the public, that the sureties upon the bond of a collector of public funds are liable in spite of an extension of the time of collection or settlement.⁷⁸ A few other courts in which the question has arisen have held the sureties discharged.⁷⁹

§ 276. Discharge of Surety by Misrepresentation or Concealment of Prior or Subsequent Defaults—Laches. While active misrepresentation or concealment of material facts affecting the risk, as of the previous defaults of the principal, will doubtless discharge the sureties on

76. Ante, secs. 215, 216; *Skillett v. Fletcher*, L. R. 1 C. P. 217; *Gaussen v. U. S.*, 97 U. S. 584; *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424; *Denio v. State*, 60 Miss. 949; *People v. Tomkins*, 74 Ill. 482; *Reynolds v. Hall*, 2 Ill. 35; *Supervisors v. Clark*, 92 N. Y. 391, disapproving *Pybus v. Gibbs*, 2 Ill. & Bl. 902. Compare *Miller v. Stewart*, supra.

77. *Loving v. Auditor*, 76 Va. 942.

78. *State v. Swinney*, 60 Miss. 39, 45 Am. R. 405, citing *Commonwealth v. Homes*, 25 Gratt. (Va.) 771; *Smith v. Com.*, 25 Gratt. (Va.), 780; *State v. Carlton*, 1 Gill (Md.), 249; *Prairie v. Worth*, 78 N. Car. 169. See, also, *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720, 736; *United States v. Nicholl*, 12 Wheat. (U. S.) 509.

79. *Johnson v. Hacker*, 8 Heisk. (Tenn.) 388; *State v. Roberts*, 68 Mo. 234, 30 Am. R. 788; *Schuster v. Weiss*, 114 Mo. 58; *Davis v. The People*, 1 Gilm. (Ill.) 409; *People v. McHatton*, 2 Gilm. (Ill.) 638.

an official bond,⁸⁰ it has been held that there is no duty on the part of the public authorities to warn sureties who tender official bonds that the principal had previously been a defaulter in office. If the bond is sufficient, it is the duty of the government agent to accept it.⁸¹ Whether the sureties on official bond are released, however, by failure of the public authorities to notify them of the subsequent defaults of the principal is less certain. If the bond stipulates for such notice its provisions, unless contrary to law, will, of course prevail. But the weight of authority, however, in the absence of such stipulation it seems that the rule of *Phillips v. Foxall*,⁸² does not apply in favor of the sureties of a strictly public officer. The decisions on this point find at least partial support in the principle that laches is not imputable to the government, and in the general considerations of public policy involved.^{82a} Furthermore in the case of public officers, the right of the master, as in the case of a private employer, to discharge at once the dishonest servant may be altogether wanting, or may require resort to judicial proceedings.⁸³

80. *Independent School Dist. v. Hubbard*, 110 Ia. 58, 80 Am. St. R. 271; *Graves v. Lebanon Nat. Bk.*, 10 Bush (Ky.), 23, 19 Am. R. 50.

81. *Pine Co. v. Willard*, 39 Minn. 125, 12 Am. St. Rep. 622, 1 L. R. A. 118; *Independent School Dist. v. Hubbard*, *supra*; see, also, *Harrisburg v. Guiles*, 192 Pa. St. 191; *State v. Rushing*, 17 Fla. 226; *State v. Dunn*, 11 La. Ann. 549; *Frownfelter v. State*, 66 Md. 80; *Lawder v. Lawder, Jr.* R. 7 C. L. 57; *Byrne v. Muzio*, L. R. 8 Ir. 396. Other cases make no distinction between private agents or servants and public officers. Disclosure must be made in either case. *Sooy v. State*, 39 N. J. L. 135; *Inhabitants of Hudson v. Miles*, 185 Mass. 182, 102 Am. St. R. 370. See, also, *Independent School Dist. v. Hubbard*, 110 Ia. 58, 80 Am. St. R. 271; *Ante*, sec. 56.

82. L. R. 7 Q. B. 666, *Ante*, sec. 207.

82a. See *Hart v. U. S.*, 95 U. S. 316, and cases cited.

83. *Mechem's Pub. Off.*, sec. 310; *Hogue v. State*, 28 Ind. App. 285; *Sioux City Independent School Dist. v. Hubbard*, 110 Ia. 58, 80 Am. St. Rep. 271; *Maryland Fidelity, etc. Co. v. Com.*, 104 Ky. 579; *Hallettsville v. Long*, 11 Tex. Civ. App. 180. See, also, *Pine Co. v. Willard*, 39 Minn. 125, 12 Am. St. R. 622, 1 L. R. A. 118.

§ 277. **Effect of New or Additional Bonds.** Where, without the consent of the original sureties, a new bond is signed and accepted, it seems that the sureties on the old bond are released from liability for subsequent defaults,⁸⁴ unless the intent of the law under which the new bond is given appears to be that such bond shall be merely cumulative.⁸⁵

84. *Stoner v. Keith Co.*, 48 Neb. 279; *U. S. v. Hillegas*, 3 Wash. (U. S.) 70. See, also, *Alvord v. U. S.*, 13 Blatch. (U. S.) 279; *U. S. v. Morris*, 2 Brock (U. S.), 96.

85. *Md. Fidelity, etc. Co. v. Fleming*, 132 N. Car. 332; *Poole v. Cox*, 31 N. Car. 69, 49 Am. D. 410; *Sullivan v. State*, 121 Ind. 342; *Maddox v. Shacklett*, 36 S. W. (Tenn. Ch. App. 1895) 731.

CHAPTER XXVII.

SURETIES ON BONDS AND UNDERTAKINGS IN THE COURSE OF JUDICIAL PROCEEDINGS. ATTACHMENT BONDS.

§ 278. **In General—Interpretation.** Bonds or recognizances with sureties are frequently required in the course of judicial proceedings. Such securities are so numerous and are so various in their nature and functions that no classification of them would be found particularly useful or suggestive, and only such of them are discussed as are most commonly met with in practice.

Commonly the rights and liabilities of sureties in judicial proceedings are governed by the same general principles that apply to other sureties, and their undertakings are subject to the same rules of interpretation as apply to the bonds of private sureties even when they are entered into by corporate surety companies.¹

§ 279. **Attachment Bonds—Nature and Purpose.** The remedy by attachment is statutory. It is also summary and drastic, inasmuch as it authorizes the taking of the debtor's property into the custody of the law at the beginning of a suit for the collection of a debt or demand, or during the pendency of the action and before judgment establishing the plaintiff's claim. Furthermore, though the plaintiff may recover judgment for the debt or demand for which the attachment is levied, the attachment itself may be wrongfully levied to the serious injury of the debtor. It is therefore an almost constant requirement of the statutes authorizing attachments, that the plaintiff shall, as a condition of the issuance of

1. Ante, sec. 93; Frost, Guar. Ins. (2d Ed.) sec. 244. See, also, 2 Brandt Sur. & Guar. (3d Ed.) sec. 511.

the writ, give bonds with sureties conditioned, ordinarily, that if the plaintiff fail to sustain the attachment that the plaintiff will pay all costs and damages incurred by reason of the suing out of the writ.² The giving of such bond is commonly essential to a valid attachment. In other words it is a jurisdictional prerequisite.³ If no bond is required, the remedy for a wrongful attachment is an action for malicious and vexatious prosecution or abuse of process;⁴ and though a bond is required and given, it does not, by the great weight of authority, supersede the common law action for malicious prosecution,⁵ and the damages recoverable upon the bond are not meant, in most states, to cover those for malicious prosecution including those of an exemplary character. These are recoverable only in a separate suit against the plaintiff. In confining the damages in an action on the bond to such as were the direct and proximate result of the attachment, court in one case said:⁶ "It cannot rationally be presumed that the legislature designed to impose on the security in the bond a more extensive liability. The statute is remedial in its character, and should be expounded so as to advance the object contemplated. To

2. See Post, sec. 280, and local statutes for the term and conditions of the bond. See, also, Drake on Attachm. (7th Ed.), appendix.

3. 1 Shinn on Attachm. sec. 154; Wade on Attachm. sec. 103; Smith v. Moore, 35 Ala. 76; Starr v. Lyon, 5 Conn. 538; Delano v. Kennedy, 5 Ark. 457; English v. Reed, 97 Ga. 477; Blake v. Sherman, 12 Minn. 421; Gowan v. Hanson, 55 Wis. 341. See, Jasper Co. v. Chenault, 38 Mo. 357. In some states no bond is required where the defendant is a nonresident. Guterson v. Meyer, 68 Neb. 767.

4. Day v. Bach, 46 N. Y. Super. Ct. 460; Palmer v. Foley, 71 N. Y. 106; Sturgis v. Knapp, 33 Vt. 486. But the plaintiff in attachment is not liable for the wrongful acts of the officer in levying on the property of a stranger unless he participated in the wrongful act or ratified it with knowledge of the facts. Adams v. Savery House Hotel Co., 107 Wis. 109.

5. Donnell v. Jones, 13 Ala. 490; 48 Am. D. 59; Sanders v. Hughes, 2 Brev. 495; Smith v. Story, 4 Humph. (Tenn.) 169; Pettit v. Mercer, 8 B. Monr. (Ky.) 51; Senecal v. Smith, 9 Robt. (La.) 418; Sledge v. McLaren, 29 Ga. 64; Churchill v. Abraham, 22 Ill. 455.

6. Pettit v. Mercer, *supra*.

impose an almost unlimited liability on the security in the bond, sufficient to embrace every possible injury the defendants might sustain, would be in effect to defeat in a great measure the object of the statute, by rendering it difficult, if not impracticable, for the plaintiff to execute the necessary bond."⁷

In several states however, damages for abuse of process, including exemplary damages, may be recovered against the sureties on the bond where the attachment was sued out maliciously or without probable cause.⁸

The damages in an action or proceeding upon the bond itself therefore do not usually extend to loss of credit or interruption of business and the like, nor can they be punitive, but are confined upon its dissolution to the actual pecuniary injury suffered by the party in being deprived of the use of the property, or by its loss, destruction or deterioration, together with the costs and expenses incurred by him in defense of the suit.⁹ But where the property in question is destroyed while out of the owner's possession under the writ, it is no defense to the recovery of its value that it was destroyed without

7. See, also, *Fidelity & Dep. Co. v. L. Buckli & Son Lumber Co.*, 189 U. S. 135, affirming 109 Fed. 393, 48 C. C. A. 436; *Hayden v. Sample*, 10 Mo. 315; *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. R. 54; *Elder v. Kutner*, 97 Cal. 290; *Thompson v. Wiber*, 4 Dak. 240; *Berwald v. Ray*, 165 Pa. 192; *Dunning v. Humphrey*, 24 Wend. (N. Y.) 31; *Winsor v. Orcutt*, 11 Paige (N. Y.), 578; *Bruce v. Coleman*, 1 Handy (Oh.), 515; *Board of Supervisors v. Stahl*, 48 Wis. 593; *Roach v. Brannon*, 57 Miss. 490.

8. *Smith v. Story*, 4 Humph. (Tenn.) 169; *Smith v. Eakin*, 2 Sneed (Tenn.), 456; *Doll v. Cooper*, 9 Lea (Tenn.), 576. See, also, *Kirksey v. Jones*, 7 Ala. 622; *Jackson v. Smith*, 75 Ala. 97; *Vandiver Co. v. Waller*, 143 Ala. 411 and cases cited; *Senecal v. Smith*, 9 Robinson (La.) 418; *Reed v. Samuels*, 22 Tex. 114; *McLaughlin v. Davis*, 14 Kan. 168. See statutes in Alabama, Iowa and Washington, and the discussion in the note to *International Harvester Co. v. Iowa Hardware Co.*, 29 L. R. A. (N. S.) at page 275.

9. 2 Suth. on Dam. (2d Ed.) 512; 1 Shinn on Attachm. sec. 190; *Drake on Attachm.* (2d Ed.) sec. 175, and cases cited. *Stanley v. Carey*, 89 Wis. 410, 413; *L. Buckli & Son Lumber Co. v. Fid. & Dep. Co.*, 109 Fed. 393, 48 C. C. A. 346, affirmed in 189 U. S. 135.

negligence or other fault of the officer, in case the attachment is wrongful.¹⁰

While damages for injury to credit, business, character or feelings cannot be recovered against the sureties on the bond,¹¹ loss of profits, if the direct and proximate result of the wrongful levy have frequently been allowed where they were not purely speculative or conjectural. The cases on this subject, however, are not harmonious and are too numerous for discussion here.¹²

§ 280. Form and Conditions of Bond—Defective Bond.

The form, penalty and conditions of the bond for attachment are usually prescribed by statute and the statutes in this respect must be at least substantially complied with, or the attachment will fail, unless the defect is waived or is merely formal. A discussion of these matters, however, is not within the purpose of this work. All statutory requirements as to justification of sureties, attestation and approval must be substantially met. The bond cannot be amended in any substantial particular save by authority of statute. Where a bond given for attachment is defective as a statutory bond, however, but a levy has actually been made, the obligors will be liable thereon as a common law obligation, if it is properly executed as such, provided the bond was voluntarily given and is not opposed to law or public policy, and this is true though the attachment is held void because of defect in the bond.¹³

§ 281. Extent of Liability of Sureties—Breach of Bond.

Bonds for attachment are strictly construed and the liability of sureties thereon will not be extended beyond

10. *Stanley v. Carey*, *supra*.

11. *Drake on Attachm.* (2d Ed.) sec. 175.

12. See 52 L. R. A. 54, note. *Stanley v. Carey*, *supra*, and cases cited and discussed.

13. 1 *Shinn on Attachm.* sec. 155; *Eckman v. Hammond*, 27 Neb. 611; *McLuckie v. Williams*, 68 Md. 262; *Morgan v. Menzies*, 60 Cal. 341; *Wright v. Keyes*, 103 Pa. 567; *Ward v. Whitney*, 8 N. Y. 442. See, also, *Gibbs v. Johnson*, 63 Mich. 671; *Williams v. Coleman*, 49 Mo. 325.

the plain terms of their undertaking,¹⁴ and are hence not bound save for the particular writ, and with respect to the property of the particular defendant, with reference to which the bond was given and the writ issued.¹⁵ The sureties are of course released if the terms of the bond have been materially changed without their consent,¹⁶ or where amendments have been allowed introducing new parties or materially changing the nature of the proceeding.¹⁷ A judicial determination that the attachment was wrongful ordinarily constitutes a breach of the condition of the bond, and such determination is binding upon the sureties as well as upon the principal in the absence of fraud or collusion.¹⁸

Where the condition of the bond is simply that the sureties shall be liable where the attachment is "wrongful," there is some conflict in the decisions as to whether there must be an adjudication dissolving the attachment, or whether the bond is breached by a voluntary abandonment of the attachment or its dismissal for want of prosecution, without an adjudication that it was issued upon insufficient grounds. A number of authorities hold that there is no liability upon the bond in the latter cases.¹⁹ Many cases hold, however, that a voluntary abandonment of the attachment proceeding, or its dis-

14. *Elder v. Kutner*, 97 Cal. 490; *Waring v. Fletcher*, 152 Ind. 620; *Furness v. Read*, 63 Md. 1.

15. *Faulkner v. Brigel*, 101 Ind. 329; *Erwin v. Coml. Bank*, 12 Rob. (La.) 227; *Mason v. Rice*, 66 Ia. 174; *Watts v. Rice*, 75 Ala. 289.

16. *Quillen v. Arnold*, 12 Nev. 234.

17. *Furness v. Read*, 63 Md. 1.

18. *Trentman v. Wiley*, 85 Ind. 33; *Churchill v. Abraham*, 22 Ill. 455; *Higdon v. Vaughn*, 58 Miss. 572; *Mihalovitch v. Barlass*, 36 Neb. 491. In a few states a recovery against the plaintiff in attachment for a wrongful suing out of the writ is a condition precedent to a right to recover on the bond. See *Holcomb v. Foxworth*, 34 Miss. 265; 1 Shinn on Attachm. sec. 133.

19. *Sharpe v. Hunter*, 16 Ala. 765; *Boatwright v. Stewart*, 37 Ark. 614; *Eaton v. Bartscherer*, 5 Neb. 469; *Storz v. Finkelstein*, 48 Neb. 27; *Petty v. Lang*, 81 Tex. 238; *Blanchard v. Brown*, 42 Mich. 46; *Nockles v. Eggspieler*, 47 Ia. 400; *Rachelman v. Skinner*, 46 Minn. 196; *Pettit v. Mercer*, 8 B. Monr. (Ky.) 51.

missal for failure to prosecute, is an admission that the attachment is wrongful, and establishes liability on the bond.²⁰

Where the attachment is dissolved or the proceeding fails because the judgment goes against the plaintiff with respect to the debt or claim for which the attachment was sued out, it has been held conclusive against the sureties that the attachment was wrongful.²¹ In any case where the bond has been breached under the rules above stated, good faith and absence of malice on the part of the plaintiff is no defense to an action on the bond.²²

The question of the liability of the sureties for consequential damages where the attachment is maliciously sued out has already been discussed.²³

§ 282. Other Bonds Given in Attachment Proceedings—Forthcoming and Re-Delivery Bonds. A forthcoming bond is one given in an attachment or other legal proceeding wherein property of the defendant is seized, by virtue of which the property is returned to the defendant, the condition of the bond being that such property shall be redelivered to the levying officer if the attachment is sustained. Under such a bond the lien of the attachment still continues, so that purchasers of the property pending the attachment take subject to the lien. Statutes in many states authorize the dissolution of the attachment upon the giving of a bond to the plaintiff to account for the debt, damages and costs or, under some statutes, for the value of the property merely. Under such a bond the attachment is usually deemed dissolved.²⁴ The

20. *Steinhardt v. Leman*, 41 La. Ann. 835; *Hollingsworth v. Atkins*, 46 La. Ann. 515; *Jerman v. Stewart*, 12 Fed. Rep. 266. Dismissal of an attachment on account of the failure of the officer to do his duty raises no presumption that the attachment was wrongful. *Afterdinger v. Ford*, 92 Va. 636.

21. *Harger v. Spofford*, 46 Ia. 11.

22. *Elder v. Kutner*, 97 Cal. 490; *Churchill v. Abraham*, 22 Ill. 455; *Pollock & Co. v. Gantt*, 69 Ala. 373; *Carothers v. McIlhenny*, 63 Tex. 138.

23. *Ante* Sec. 279.

24. See *Nichols v. Chittenden*, 14 Col. App. 49; *Post*, next section.

giving of such a bond is not an admission that the attachment was rightfully obtained nor does it affect the attachment proceedings. It is simply meant to secure the defendant possession of the property pending the proceeding.²⁵ If the property is actually delivered to the defendant upon the giving of a bond, it is no defense on the part of the sureties that it is not in the form provided by statute,²⁶ and so where there is failure to obtain a preliminary order of court as provided by statute.²⁷

No recovery can be had on the bond unless the property is actually delivered to the defendant in accordance with its terms and is left in his possession pending adjudication in the particular case; and hence, where the sheriff immediately seized the property, under another attachment by the same plaintiff,²⁸ or retained it because of the insufficiency of the sureties, it was held that the bond was not liable.²⁹

§ 283. Bonds to Dissolve Attachment. A bond to dissolve an attachment differs from a forthcoming or redelivery bond in the fact that it is meant, not merely to secure to the defendant the possession of the property attached pending adjudication, but to stand in lieu of such property as security for the payment of such judgment as may ultimately be recovered in the action, or of the value of the property, at least.³⁰ The giving of the bond ordinarily terminates the attachment though not the action in which the attachment was made. The proceeding, thenceforward, is purely in personam. That the attachment was invalid is ordinarily no defense to an

25. *Alexander v. Jacoby*, 23 Oh. St. 358.

26. *Wright v. Keyes*, 103 Pa. St. 567.

27. *Sullivan v. Williams*, 43 S. Car. 489.

28. *Schneider v. Wallingford*, 4 Col. App. 150.

29. *Cortelyou v. Maben*, 40 Neb. 512.

30. Ante, sec. 282; *Pacific Nat. Bank v. Mixer*, 124 U. S. 721; *Nichols v. Chittenden*, 14 Col. App. 49; *State ex rel. Russell v. Fargo*, 151 Mo. 280.

action on the bond.³¹ Where the attachment is void, however, because illegal in the sense that it is prohibited by law, a bond to dissolve it is void.³²

Usually, under a bond to dissolve an attachment, judgment for the plaintiff is conclusive against the defendant's sureties in the absence of fraud or collusion.³³

31. *Pacific Nat. Bk. v. Mixter*, 124 U. S. 721; *Dierolf v. Winterfield*, 24 Wis. 143. But see and compare *Hazelrigg v. Donaldson*, 60 Ky. 445; *Smith v. U. S. Express Co.* 135 Ill. 279; *Vose v. Cockcroft*, 44 N. Y. 415; *Schuyler v. Sylvester*, 28 N. J. L. 487; *Ferguson v. Glidewell*, 48 Ark. 195; *Bowers v. Beck*, 2 Nev. 139.

32. *Pacific Nat. Bk. v. Mixter*, 124 U. S. 721.

33. *Tapeley v. Goodsell*, 122 Mass. 176, 182; *Jaynes v. Platt*, 47 Oh. St. 262, 21 Am. St. R. 810; *Sutro v. Bigelow*, 31 Wis. 527, *Supra*, note 18.

CHAPTER XXVIII.

REPLEVIN BONDS

§ 284. **In General.** Replevin, as it at present exists, is an action for the recovery of specific chattels wrongfully taken or detained, together with damages for their detention, or, if the property cannot be returned in specie, then the value of such property, upon security given by the plaintiff to return the property to the defendant if he fails to sustain his case.¹ Further discussion of the present nature of the action seems unnecessary to an understanding of the liability of sureties upon replevin bonds. Generally the taking of a bond or undertaking, with sufficient sureties, is a necessary prerequisite to the issuance of the writ of replevin, or at least to its execution, and next to the affidavit is the most important matter in a replevin action.² The object of the bond is not merely to indemnify the sheriff but to afford an efficient remedy to the defendant in case the plaintiff fails to maintain his suit.³

§ 285. **Form, Execution and Conditions of Replevin Bond.** Usually, the statutes prescribe the form and conditions of the bond. But though the bond does not

1. *Burrage v. Melson*, 48 Miss. 237; *Frederick v. Tracy*, 98 Cal. 658; *Hewitson v. Hunt*, 8 Rich. (S. Car.) 106. See also, 3 Bl. Com. 145; Co. Litt. 145 B. *Cobbey on Replevin* (2d Ed.), secs. 1, et seq.; *Sinnott v. Felock*, 165 N. Y. 444, 80 Am. St. R. 736, 53 L. R. A. 565; *Watson v. Watson*, 9 Conn. 140, 23 Am. D. 324, for the earlier history of the action.

2. See *Cobbey on Replevin* (2d Ed.), secs. 665 etc seq.; *Cummings v. Garen*, 52 Pa. St. 488; *Tuck v. Moses*, 58 Me. 463.

3. *Ward v. Hood*, 124 Ala. 570; *Imel v. Van Deren*, 8 Col. 90; *Walker v. Kennison*, 34 N. H. 257; *Smith v. Whiting*, 97 Mass. 316. The liability of sureties on a replevin bond has been said to resemble that of bail. The security in the one case is no more a substitute for the goods than that in the other is a substitute for the person. *Badlam v. Tucker*, 1 Pick. (Mass.) 284, 287.

strictly conform to the statute, it may still be good as a common law obligation. If the defendant sees fit to treat it as valid, instead of moving to dismiss, the obligors are estopped to question its sufficiency on account of formal or technical defects.⁴

The conditions of the bond are not the same in all states. Ordinarily, however, the conditions are substantially that the plaintiff will (1) diligently prosecute the action, (2) with success, or (3) restore the property or its value to the defendant and (4) pay all damages and costs incident to the wrongful seizure and detention.⁵ Each of these conditions is an independent obligation and is capable of an independent breach.⁶

§ 286. Breach of Bond. Where the judgment is against the plaintiff on the merits, it is a breach of the condition to prosecute the action, and a voluntary dismissal or submission to a nonsuit has the same effect;⁷ and so if it is dismissed on motion of the defendant for want of jurisdiction.⁸ Where the action abates without the fault of the plaintiff, however, as where the action falls or abates through the absence of the court,⁹ or by reason of the death of a party, the condition is not broken.¹⁰ Dismissal because of some defect in the procedure or for failure of proof, however, is a breach of the bond.¹¹

4. *Livingston v. Superior Court*, 10 Wend. (N. Y.) 545; *Tuck v. Moses*, 54 Me. 115; *Claggett v. Richards*, 45 N. H. 360; *Morse v. Hodsdon*, 5 Mass. 314; *Leper, Graves & Co. v. First Nat. Bank*, 26 Okla. 707, 29 L. R. A. (N. S.) 747, and cases cited in the note.

5. See Stat. 2 Geo. II, ch. 19, sec. 23.

6. *Cobbey on Replevin*, secs. 67, 1250 et seq. and cases cited. *Vinyard v. Barnes*, 124 Ill. 346, 350 and cases cited.

7. *Mackey v. Lauffin*, 48 Kan. 581; *Wiseman v. Lynn*, 39 Ind. 250; *Alderman v. Roesel*, 52 S. Car. 162. Compare *Vinyard v. Barnes*, 124 Ill. 350.

8. *Biddinger v. Pratt*, 50 Oh. St. 719; *Pierce v. King*, 14 R. I. 611.

9. *Pierce v. Hardee*, 1 Thomp. & C. (N. Y.) 557.

10. *Burkle v. Luce*, 1 N. Y. 163; *Badlam v. Tucker*, 1 Pick. (Mass.) 284. Compare *McCormick*, etc. Co. v. *Fisher*, 63 Kan. 199.

11. *Smith v. Whiting*, 100 Mass. 122; *Clark v. Norton*, 6 Minn. 412; *Pettygrove v. Hoyt*, 11 Me. 66; *Elliott v. Black*, 45 Mo. 372.

Usually, in replevin, if the judgment is against the plaintiff, it is for the dismissal of the action and the return of the property replevied. The details of the procedure to establish a breach of the bond in this particular are not within the scope of our discussion. It is enough to say that, the proper procedure being had, if the plaintiff fails to return or offer to return the property replevied, the bond is breached, and no demand by the defendant is necessary before suit.¹² It is no excuse for failure to return that return is impossible unless, perhaps, return is rendered impossible by the act of God or of the law.¹³

§ 287. Effect of Adjudication Against Plaintiff Upon Liability of Surety. Judgment for the defendant dismissing the action or finding the right of possession in him is conclusive against the plaintiff and his sureties in an action upon the bond,¹⁴ and a judgment against the plaintiff by consent is binding on the sureties unless it is collusively entered.¹⁵ So far as matters necessarily adjudicated in the replevin action are concerned, the sureties are concluded in an action on the bond though they did not appear or have an opportunity to be heard in the principal action.¹⁶

12. *Sweeney v. Lomme*, 22 Wall. (U. S.) 208; *Wetherbee v. Colby*, 6 Vt. 647.

13. *Ward v. Hood*, 124 Ala. 570, 82 Am. St. R. 205; *Schott v. Youree*, 142 Ill. 233; *Suppinger v. Gruaz*, 137 Ill. 216; *Capen v. Bartlett*, 153 Mass. 346; *George v. Hewlette*, 70 Miss. 1, 35 Am. St. R. 626. Death of an animal without fault of the plaintiff, held to excuse return. *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589; *Melvin v. Winslow*, 10 Me. 397. And so of the emancipation of a slave by the president's proclamation. *Pait v. McCutchen*, 43 Tex. 291. See *Arthur v. Ingles*, 34 W. Va. 639, 11 L. R. A. 557.

14. *Cobbey on Replevin*, sec. 1267; *Mason v. Richards*, 12 Ia. 73; *Ernst v. Hogue*, 86 Ala. 502; *Jacobson v. Metzgar*, 43 Mich. 403; *Peck v. Wilson*, 22 Ill. 205.

15. *Estey v. Harmon*, 40 Mich. 645.

16. *Denny v. Reynolds*, 24 Ill. 248. Where property was found to be in the defendant, sureties on the replevin bond cannot in an action thereon show title in a stranger; *Smith v. Lisher*, 23 Ind. 500.

§ 288. **Damages on Replevin Bonds.** If no recovery is had in the replevin action, the damages must, of course, be assessed in an action on the bond itself unless, it seems, the case is tried upon the merits and found for the defendant without an assessment of damages. In such case the failure to prove damages in the main action, there being opportunity to do so, will prevent such proof in an action on the bond.¹⁷ Where the condition for the return of the property is breached, the measure of damages is ordinarily the value of the property or the defendant's interest therein, at the time of the trial, with interest.¹⁸ For breach of the condition of the bond covering wrongful taking and detention, the damages are such as will fairly indemnify the defendant for the injury sustained thereby. The value of the use of property of similar character will ordinarily be awarded, or even in special cases the value of the use to him.¹⁹ Counsel fees and other expenses of defendant are not ordinarily recoverable unless by statute, or unless the writ is maliciously and vexatiously sued out.²⁰

17. *Stevens v. Tuite*, 104 Mass. 328.

18. *Washington Ice Co. v. Webster*, 125 U. S. 426; *Gardner v. Brown*, 22 Nev. 156; *Kirkendall v. Hartsock*, 58 Mo. App. 234.

19. See *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. R. 282, 284n; *Cobbey on Replevin*, chapters XXX and XXXI, and particularly the author's "Postulates," in sec. 697. See, also, the extended note to *Lake v. Hargis*, 82 Kan. 711, in 30 L. R. A. (N. S.) 366.

20. See the note to *Lake v. Hargis*, *supra*, at p. 372.

CHAPTER XXIX.

BONDS AND UNDERTAKINGS ON APPEAL.

§ 289. **In General.** Before questions of law or fact can be re-examined by a court of appellate jurisdiction, it is the almost uniform requirement of statutes, both here and in England, that the appellant or plaintiff in error shall file a bond or undertaking with sufficient sureties conditioned, commonly, that he will prosecute the cause in the appellate court with effect, or pay all damages and costs.¹

The amount of damages must, of course, depend upon the terms and conditions of the undertaking, the statutes under which it is given and the character of the judgment appealed from. The amount of damages, where the appeal is from a money judgment and the bond is conditioned to prosecute to effect or pay the damages caused by the appeal, would naturally be the interest on the judgment from the date thereof to the date of affirmance.² In modern practice the penalty of the bond is not the measure of damages but judgment can only be rendered or enforced for the full penalty where the damages actually proved equal or exceed it.³ The penalty of the bond in any case is the maximum of liability. Where the respondent has been deprived of the possession and enjoyment of his property by the appeal, the rents and profits are ordinarily the measure of damages. Where the bond operates as a stay of execution, the obligee may recover for losses sustained by reason of having been prevented from enforcing the judgment, as where property available for that purpose has deterior-

1. *Omaha Hotel Co. v. Kountze*, 107 U. S. 378.

2. *Post*, sec. 294; *Mason v. Smith*, 11 Lea (Tenn.), 67.

3. *Cockrill v. Owen*, 10 Mo. 287; *Post*, sec. 294.

ated in value pending the appeal.⁴ Furthermore, though a writ of error operated at common law as a supersedeas without security being given,⁵ it is quite generally provided by statute that in cases where a stay of execution is sought, or the appellate proceeding itself operates as a stay or supersedeas, security shall be given for the payment, not merely of the damages and costs incident to the appeal, but for the payment or performance of the judgment itself or so much of it as may be affirmed.⁶ Usually the appellate court acquires no jurisdiction until the required bond is given in substantial compliance with the statute, at least where timely objection is made to the sufficiency of the bond.⁷

§ 290. Form and Execution of Appeal Bonds. As to the form of bonds on appeal or error it was said in *Omaha Hotel Co. v. Kountze*:⁸ "As an appeal bond, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in. We think the rule followed in some of the states is a sound one, that if the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it

4. *Omaha Hotel Co. v. Kountze*, 107 U. S. 378; *Opp v. Ward*, 125 Ind. 241, 21 Am. St. R. 220 and authorities cited.

5. *Omaha Hotel Co. v. Kountze*, *supra*. *Fotterall v. Floyd*, 6 Serg. & R. (Pa.) 315.

6. See Post, sec. 294; *Richardson v. Richardson*, 82 Mich. 305; *Anderson v. Meeker County*, 46 Minn. 237; *Southern Pacific Ry. Co. v. Staley*, 76 Tex. 418; *Graham v. Swigert*, 12 B. Mon. (Ky.) 522, 2 Suth. on Dam. (2d Ed.) sec. 531; *Ward v. Bell*, 18 Ind. 112.

7. *Swan v. Hill*, 155 U. S. 394.

8. *Supra*.

is sufficient to sustain it, though it contain variations of language, and that if further conditions be superadded, the bond is not therefore invalid so far as it is supported by the statute, but only as to the superadded conditions."⁹ The right of appeal, however, is a valuable and favored one, and if a judicial order is a necessary condition of allowance, and such order is withheld unless a bond with conditions in excess of what the law requires is given, some courts hold the bond void, not merely as to the excess, but in toto.¹⁰

It is generally held that where the bond contains less than the law requires, the deficiency cannot be supplied by construction or intendment of law,¹¹ though it may be valid so far as its express provisions actually go, either as a statutory bond or as a common law obligation.

Where the defect in the bond or its execution involves matters plainly meant for the protection of the obligee, such defect may be waived by him expressly, orally or in writing, or by his acts in accepting the bond as sufficient under the statute,¹² or in failing to take advantage of the defect by moving for dismissal in proper time,¹³ or in delaying execution in reliance on

9. In accord with the principal case are *Sanders & Fernwick v. Rives*, 3 Stew. (Ala.) 109; *Tomlin v. Green*, 39 Ill. 225; *Conger v. Robinson*, 4 Sm. & M. (Miss.) 210; *Banks & Walker v. McDowel*, 1 Coldw. (Tenn.) 85; *Landa v. Heerman*, 85 Tex. 1; *Court of Insolvency v. Meldon*, 69 Vt. 510; *Post v. Doremus*, 60 N. Y. 371; *Halsey v. Flint*, 15 Abb. Pr. (N. Y.) 367. But see *Newcomb v. Worster*, 7 Allen (Mass.), 198.

10. *Com. v. Wistar*, 142 Pa. St. 373 and cases cited; *Dennison v. Mason*, 36 Me. 431; *Harrington v. Brown*, 7 Pick. (Mass.) 232; *Newcomb v. Worster*, 7 Allen (Mass.), 98. The obligation is valid, however, if voluntarily assumed. *Com. v. Wistar*, *supra*.

11. See, *infra*, note 16 and cases cited. *Boulden v. Estey*, 92 Ala. 182; *Pitt v. Swearingen*, 76 Ill. 250. But see *Dye v. Dye*, 12 Col. App. 206; *Gilpin v. Hord*, 85 Ky. 213. See *Stults v. Zahn*, 117 Ind. 297 (under statute).

12. *Blair v. Hamilton*, 32 Cal. 49; *Allen v. Kellam*, 94 Pa. 253.

13. *Manning v. Gould*, 90 N. Y. 476.

the bond.¹⁴ Certain requirements that have been held directory and capable of waiver by the appellee are stated in the note below.¹⁵ But where an essential term or element cannot be gathered from the bond itself, or from the bond and the record, without the aid of extrinsic evidence, the bond will commonly be held void unless some statute existing when it was executed cures the defect.¹⁶ A bond that contains no avoiding clause¹⁷ or which does not identify the appellant,¹⁸ or identify the judgment appealed from, has been held void. But a misdescription of the judgment as by mistake in the date of its rendition has been held immaterial where the bond was not filed until after the date assigned by it to the judgment.¹⁹ So, failure to state to what court the appeal was taken was held not to affect the validity of the bond where there was only one court to which an appeal would lie.²⁰ The omission of the names of the

14. *Jones v. Droneberger*, 23 Ind. 74. See, also, *State v. Sixth Judicial Dist. Ct.* 22 Mont. 449, 74 Am. St. R. 618.

15. Requirement as to the amount of the penalty of the bond. *Landa v. Heerman*, 85 Texas, 1; *Bentley v. Dorcas*, 11 Oh. St. 398. That the sureties justify; *Murdock v. Brooks*, 38 Cal. 596; *Hill v. Burke*, 62 N. Y. 111. That the sureties state their place of residence or occupation; *Dove v. Covey*, 13 Cal. 502. That the bond be approved officially or judicially. *Fidelity & Deposit Co. v. Bowen*, 123 Ia. 356, 6 L. R. A. (N. S.) 1021; *Crowder v. Morgan*, 72 Ala. 535; *Jones v. Droneberger*, 23 Ind. 74. Contra, *Keen v. Whittington*, 40 Md. 489. A statute forbidding attorneys to become sureties on judicial bonds has been held not to affect their liability. *McKellar v. Peck*, 39 Tex. 381. Compare, *Cothren v. Connaughton*, 24 Wis. 134. That only one surety signed instead of two as required by statute may be waived. *Allen v. Kellam*, 94 Pa. 253.

16. *Gavisk v. McKeever*, 37 Ind. 484; *Stults v. Zahn*, 117 Ind. 297; *Coleman v. Crumpler*, 2 Dev. L. (N. Car.) 508; *People v. Munroe*, 3 Wend. (N. Y.) 426; *Schill v. Reisdorf*, 88 Ill. 411; *Block v. Blum*, 33 Ill. App. 643.

17. *Waller v. Pittman*, 1 Carn. & N. (N. Car.) 107; *Hawes v. Sternheim*, 57 Ill. App. 126.

18. *Brown v. McLaughlin*, 8 Humph. (Tenn.) 140. But see *Wile v. Koch*, 54 Oh. St. 608.

19. *Pray v. Wasdell*, 146 Mass. 324.

20. *Stillings v. Porter*, 22 Kan. 17.

sureties from the body of the bond is immaterial where they have actually executed it.²¹

§ 291. Consideration for Undertakings on Appeal—Estoppel. Unless a bond or undertaking on appeal is by statute made a condition precedent to the bringing or prosecution of the proceedings or a stay of execution, it will be invalid unless it has an independent consideration to support it.²² So where a bond to stay execution was given, but an appeal bond already given operated as a stay, the former was held void for want of consideration, even as a common law obligation, for it effectuated no legal purpose not already accomplished.²³ If no appeal can lawfully be taken it has been held that the bond is absolutely void for want of consideration,²⁴ though bonds given under such circumstances have sometimes been upheld on the ground of estoppel, at least where proceedings to enforce the judgment have been delayed by the giving of the bond.²⁵ So where there was really no judgment in the lower court, it has been held that the obligors on an appeal bond reciting a judgment were estopped to deny its existence by the recitals,²⁶ or by the receipt of benefits derived from the giving of the bond.²⁷ It has been held by some authorities, however, that bonds given in such cases are void for want of consideration,

21. *Cooke v. Crawford*, 1 Tex. 9, 46 Am. D. 93.

22. *Estate of Kenedy*, 129 Cal. 384; *Lowe v. Riley*, 57 Neb. 252; *Gimperling v. Haynes*, 40 Oh. St. 114.

23. *Powers v. Chabot*, 93 Cal. 266. See, also, *O'Brien v. Cary*, 34 N. Y. App. Div. 328, 54 N. Y. Suppl. 337; *Ham v. Greve*, 41 Ind. 531. 535.

24. *Brounty v. Daniels*, 23 Neb. 162; *Ashley v. Brazil*, 1 Ark. 144.

25. *Keller v. Breeler*, 4 J. J. Marsh. (Ky.) 655; *Ray v. Ray*, 1 Idaho, 705; *Swofford Bros. Dry Goods Co. v. Livingston*, 16 Col. App. 257. *Gudtuer v. Kilpatrick*, 14 Neb. 347; *Sutherland v. Phelps*, 22 Ill. 91; *Meserve v. Clark*, 115 Ill. 580; *Love v. Rockwell*, 1 Wis. 382; *Chase v. Smith*, 4 Cranch C. C. (U. S.) 90.

26. *Thalheimer v. Crow*, 13 Col. 397; *Courson v. Browning*, 78 Ill. 208; *Healey v. Newton*, 96 Mich. 228; *Parrott v. Kane*, 14 Mont. 23; *Brounty v. Daniels*, 23 Neb. 162.

27. *Dye v. Dye*, 12 Colo. App. 206.

upon the ground that there is no appeal because there is nothing to appeal from.²⁸ As to void judgments a similar conflict in the decisions will be found, some courts upholding the appeal bond on the ground of estoppel,²⁹ or on the ground that a right to a determination of the invalidity of the judgment is a valuable right which can only be realized by an appeal of which the bond itself is a condition;³⁰ while others argue that if the judgment is void there is nothing to appeal from, and hence no appeal, and that consequently the bond is without consideration and void.³¹

§ 292. Breach of Condition. The condition that the appellant will prosecute his appeal with effect is broken if he fails to perfect it or to prosecute it and it is dismissed on that account,³² and so ordinarily, where there has been a final judgment of the appellate court, dismissing the appeal or affirming the judgment below. Affirmance, however, to work a breach of the bond must be a substantial affirmance. Precisely what constitutes a substantial affirmance has not been uniformly determined. Where the judgment of the appellate court was for a larger sum than the judgment appealed from the sureties were held bound for the amount of the original judgment.³³

28. *Carter v. Hodge*, 150 N. Y. 532; *Galloway v. Yates*, 10 Minn. 75.

29. *Gross v. Weary*, 90 Ill. 256; *Butler v. Wadley*, 15 Ind. 502; *Co-operative Assn. v. Rohl*, 32 Kan. 663; *Stephens v. Miller*, 3 Ky. L. 523.

30. *Mueller v. Kelly*, 8 Col. App. 527; see, also, *Knight v. Waters*, 18 Ia. 345; *Butler v. Wadley*, 15 Ind. 502.

31. *Dexter v. Sayward*, 84 Fed. 296; *Hessey v. Heitkamp*, 9 Mo. App. 36 and cases cited. See, also, *Tarbell v. Gray*, 4 Gray (Mass.), 444. Compare, *West v. Carter*, 129 Ill. 249.

32. *Long v. Sullivan*, 21 Col. 109; *Com. v. Grene*, 138 Mass. 200; *Trent v. Romberg*, 66 Tex. 249; *Sutherland v. Phelps*, 22 Ill. 91. See *Dexter, Horton Co. v. Sayward*, 84 Fed. 296.

33. *Horner v. Lyman*, 4 Keyes (N. Y.), 237; see also, *Mitchell v. Shurt*, 17 Mich. 65.

A bond to satisfy the judgment appealed from is, of course, breached only upon substantial affirmance and will not, it seems, cover the costs in the appellate court,³⁴ though it will cover the costs below for they are part of the judgment.

Where there is an affirmance in part only, the liability of the bond depends upon its terms. Thus, there is generally no breach of the condition to "prosecute to effect" where the sum found due the appellee is less than the judgment appealed from,³⁵ though the contrary has been held.³⁶

If the bond, however, contains a condition to satisfy whatever judgment may be rendered on the appeal there is a breach if any part of the original judgment is affirmed.³⁷ Thus, reversal as to an attachment does not prevent a breach by the affirmance of the principal judgment,³⁸ and a judgment releasing part of the land from a mechanic's lien is a breach where there is an affirmance as to the residue.³⁹

If the appeal abates because of the death of the appellant, his sureties are excused unless his representatives take proper steps to revive it.⁴⁰

§ 293. Sureties on Successive Appeal Bonds. The general rule as to the liability of sureties on successive appeal bonds has been well stated as follows: "Where the bond is given in a subordinate court to prosecute an ap-

34. *Many v. Sizer*, 6 Gray (Mass.), 141; *Johnson v. Ward*, 21 Ky. L. 783..

35. *Heinlen v. Beans*, 71 Cal. 295; *Feemster v. Anderson*, 6 T. B. Monr. (Ky.) 537; *Seymour v. Gregory*, 10 Bliss. (U. S.) 13; see *McCullion v. Hibernia Sav. Soc.*, 83 Cal. 571.

36. *Hopkins v. Orr*, 124 U. S. 510; *Harding v. Kuessner*, 172 Ill. 125; *Brooks v. Page*, 1 D. Chipm. (Vt.) 340.

37. *Deatherage v. Scheidley*, 50 Mo. App. 490.

38. *Krone v. Cooper*, 43 Ark. 547.

39. *Deatherage v. Sheidley*, *supra*. See, also, *Bem v. Shoemaker*, 7 S. Dak. 510; *Cook v. Ligon*, 54 Miss. 625.

40. *Nelson v. Anderson*, 2 Call (Va.), 286. Compare, *Legate v. Marr*, 8 Blackf. (Ind.) 404.

peal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction but the reversal of the judgment in some court having jurisdiction to correct the alleged error."⁴¹

But though successive appeal or stay bonds are thus cumulative in favor of the obligee, the sureties on the bond last given are ordinarily liable to the amount not exceeding its penalty to the sureties on a prior bond, for reasons already stated;⁴² and this rule applies in favor of the sureties on the original obligation which was the basis of the judgment appealed from or upon which a stay was granted.⁴³

§ 294. Remedy—Damages on Appeal and Supersedeas Bonds. The liability to pay damages upon an appeal or supersedeas bond becomes perfect only when they are assessed in a proper action or proceeding. In many states a summary proceeding for this purpose is provided by statute. Such proceeding, however, is usually deemed cumulative to the ordinary remedy by action on the bond.⁴⁴ The damages recoverable upon an appeal bond depend very largely, of course, upon the terms of the bond and of the statute under which it is given. If it is conditioned for the payment merely of the costs and damages incident to the appeal, it does not ordinarily cover the judgment appealed from. But where the bond,

41. *Babbitt v. Finn*, 101 U. S. 7, per Clifford, J.

42. Ante, sec. 152, and authorities cited. See, also, 2 Brandt Sur. & Guar. (3d Ed.) secs. 517, 518, 519; *Opp v. Ward*, 125 Ind. 241, 21 Am. St. R. 220, and authorities cited.

43. Ante, sec. 152; *Opp v. Ward*, supra, and authorities cited.

44. *Charleston Bank v. Moore*, 6 Ga. 416; *State v. Boies*, 41 Me. 344; *Wilcox v. Daniels*, 22 Mo. 493; *Trent v. Rhomberg*, 66 Tex. 249.

though not conditioned for the payment or performance of the judgment, is conditioned to pay damages caused by the appeal, and the proceeding operates as a stay or supersedeas, the sureties may be liable for the full amount of the judgment affirmed, if this is within the penalty of the bond, as where the judgment was collectible when the bond was given, and wholly uncollectible when the judgment was affirmed. Where no such result ensues, legal interest on money tied up by the appeal is the usual measure of damages, though statutory damages at a higher rate are sometimes provided for. If, as a result of the appeal, the obligee is kept out of his property, the rents and profits are commonly allowed as damages;⁴⁵ and a similar ruling has been made where a relator was kept out of office by an appeal, as to the emoluments of such office.⁴⁶ So depreciation in market value of property that might otherwise have been sold has been held recoverable.⁴⁷

Where the condition of the bond is to satisfy the judgment in case of affirmance, the judgment, with interest and costs, is the usual measure of recovery.⁴⁸ In some states, by statute, execution against the principal is a prerequisite to the remedy against the surety for breach of this condition, but unless this is the case, a showing of substantial affirmance and nonpayment of the judgment is all that is required in an action on the bond.⁴⁹

45. See *Omaha Hotel Co. v. Kountze*, 107 U. S. 378; *Burgess v. Doble*, 49 Mass. 256; *Keegan v. Kinnare*, 123 Ill. 280; *Estate of Gleeson*, 192 Pa. St. 279, 73 Am. St. R. 808. Compare *Drew v. Chamberlin*, 19 Vt. 573.

46. *U. S. v. Addison*, 6 Wall. (U. S.) 291.

47. *Bemiss v. Com.*, 113 W. Va. 489.

48. See ante sec. 292.

49. See, generally, on the subject of this section, 2 *Suth. on Dam.* (2d Ed.) sec. 531.

CHAPTER XXX.

RECEIVER'S BONDS—INJUNCTION BONDS.

§ 195. **Receiver's Bonds—In General.** A receiver is an indifferent person between the parties to a cause appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it.¹

Before entering upon their duties, receivers are usually required to enter into a bond or a recognizance with sufficient sureties for the faithful performance of their duties, the amount and conditions of the security being determined by the appointing court with due regard to the nature and value of the property or fund entrusted to their care or management and the circumstances of the case. Under the English practice it was customary to require the receiver to enter into a recognizance with two sureties, but there were exceptions to this requirement unnecessary to note.

In the absence of statute in this country, the courts adhere more or less closely to the English chancery practice and it is doubtless within the sound discretion of the court to require bonds of a receiver in any case.

Where a bond is required by the order of appointment, the receiver's title and authority and his right to possession are dependent upon the giving of the bond required, though upon filing the bond his authority will usually relate back to the date of appointment and will be upheld as against creditors levying upon the property in the interim.²

§ 296. **Liability of Sureties on Receiver's Bonds.** Sureties on receivers bonds are usually held strictly to the

1. High on Receivers (3d Ed.), sec. 1.

2. High on Receivers (3d Ed.), Sec. 121, 121a.

terms of their undertaking and will not be discharged therefrom upon their own application unless such course appears to be for the benefit of the parties to the cause, or unless fraud is shown upon the part of the persons secured.³ Under the usual terms of a receiver's bond or recognizance, the obligation is to become void if he shall duly perform his duties and account to the court, and the obligation becomes absolute upon his failure so to do, at least after a proper rule or order has been made against him.⁴ Ordinarily, however, the receiver and his sureties are not liable to an action upon the bond until the receiver has failed to obey some order of the court touching the property and effects confided to his care, and the proper practice is to first apply to the court for a rule or order upon the receiver to render his account. After the account is adjusted and approved by the court and the receiver is ordered to pay the effects in his hands into court or to the person designated in its judgment or order, his failure so to do renders him and his sureties liable. No action will lie upon the bond, however, until the court has adjudicated the question and made some order as above indicated with which the receiver has failed to comply.⁵ Upon a death of a receiver indebted to the estate, the amount of which indebtedness is not definitely ascertained, the court will, on petition of the parties in interest, grant leave to put the undertaking in suit against the sureties, who, upon paying the judgment, will be entitled to reimbursement from the estate of the receiver.⁶

§ 297. Same—How far Judgment or Decree Against Receiver Binds Sureties. By the weight of authority if the language of the bond or undertaking expressly, or by a fair construction of its terms contemplates a sub-

3. *Hamilton v. Brewster*, 2 Mo. 407.

4. *Monsell v. Egen*, 3 J. & La. T. 351, and cases in the next note below.

5. *State v. Gibson*, 21 Ark. 140; *Bank of Washington v. Creditors*, 86 N. Car. 323; *Atkinson v. Smith*, 89 N. Car. 72.

6. See *Ludgater v. Channell*, 3 Mac. & G. 175.

mission by the parties to a judgment against the receiver, as where it is conditioned for the faithful performance of his duties, the sureties thereon are absolutely bound by a judgment or decree against him for breach of his official duties covered by the bond, unless such judgment is the result of fraud or collusion.⁷ By some authorities, however, an adjudication against the receiver is only *prima facie* evidence against the sureties where they were not parties to the proceeding in which his default was established, at least where the bond is conditioned merely in general terms for the faithful performance of the trust.⁸ If the sureties have an opportunity to appear and be heard in a chancery accounting against the principal, they are absolutely concluded by the result.⁹ Leave of court is ordinarily necessary to a suit upon a receiver's bond.¹⁰

A surety for a receiver is entitled, of course, to be indemnified for whatever he has paid on account of his principal's default, and the court will see that any fund due the receiver that is in its hands or under its control will be applied to this purpose.¹¹

§ 298. Injunction Bonds—In General—When Required. The plaintiff in a suit in which an interlocutory injunction is sought is usually required, as a condition precedent to obtaining it, to file a bond with sufficient sureties conditioned for the payment of all costs and damages that may accrue to the defendant in the event of the injunction being improperly granted. Where the statute requires such a bond as a condition precedent to the

7. Ante, sec. 254; *Com. v. Gould*, 118 Mass. 300; *Preston v. Am. Surety Co.*, 104 Md. 40; *Ball v. Chancellor*, 47 N. J. L. (18 Vroom) 125, 134; *Thompson v. McGregor*, 13 Jones & S. 197; *State v. Abbott*, 63 W. Va. 189; *Clark v. First Nat. Bank*, 57 Mo. App. 277.

8. See *Com. v. Gould* supra; *Preston v. Am. Surety Co.*, supra; *Carl v. Meyer*, 51 App. Div. 5, 64 N. Y. Supp. 1077.

9. *Ball v. Chancellor*, 147 N. J. L. 125.

10. *Black v. Gentery*, 119 N. Car. 502.

11. *Glossop v. Harrison*, Coop. 61, 10 Eng. Ch. 61, 3 Ves. & B. 134.

issuance of an injunction, it is error to grant it without the required bond.¹² In the absence of statute prescribing the conditions of the bond, its terms and conditions are within the discretion of the court unless the statute itself prescribes the conditions of the bond. But failure to give a bond upon obtaining a preliminary injunction will not prevent the plaintiff from obtaining a permanent injunction upon final hearing.¹³ The insufficiency of the bond, however, does not of itself constitute ground for dissolving an injunction in the first instance but a reasonable time should be allowed for filing a new bond, the injunction meanwhile continuing in force.¹⁴ Indeed a motion to dissolve will not be entertained where it is based upon the mere inadequacy of the bond where there is no suggestion that complainant is insolvent and unable to respond in damages, since the court may always require additional security.¹⁵

§ 299. Liability of Sureties on Injunction Bonds. Injunction bonds like the undertakings of other sureties are strictly construed and the obligation of the sureties will not be extended beyond the plain import of their terms,¹⁶ nor can the parties to the injunction suit vary or extend the liability of the sureties on the bond by stipulation.¹⁷

§ 300. Remedy on Injunction Bonds. In the absence of statute, a court of equity has no power to render judgment against the sureties upon an injunction bond and it has even been held that statutory authority to render judgment against the principal on the bond upon dissolution of the injunction does not imply power to

12. *Miller v. Parker*, 73 N. Car. 58.

13. *Harrison v. Board of Supervisors*, 51 Wis. 645.

14. *Beauchamp v. Supervisors*, 45 Ill. 274; *Chesapeake & O. R. Co. v. Patton*, 5 W. Va. 234; *Gamble v. Campbell*, 6 Fla. 347.

15. *Crawford v. Paine*, 19 Ia. 172.

16. *Webber v. Wilcox*, 45 Cal. 301; *Ovington v. Smith*, 78 Ill. 250; *Anderson v. Falconer*, 34 Miss. 257.

17. *Mix v. Vall*, 86 Ill. 40; see, also, *Hall v. Livingston*, 3 Del. Ch. 348.

render judgment against the sureties.¹⁸ In fact, a statute empowering the court to enter summary judgment against the principal and sureties upon the dissolution of an interlocutory injunction has been held unconstitutional and void.¹⁹

The remedy, at least in the absence of statute, is by an action or proceeding upon the bond. Sometimes, however, the terms of the bond itself fix the manner in which the liability of the sureties thereon shall be ascertained, as, for example, by reference made to determine the damages. Where this is the case, the sureties are concluded by the result of the reference as confirmed by the court, even though they were not given notice and opportunity to be heard, and where the bond, as is commonly the case, is conditioned for the payment of such costs and damages as are awarded against the principal, a judgment against him is ordinarily conclusive against them.²⁰

In the federal courts, at least, it seems that a bond conditioned for the payment of such damages as may be *awarded* by reason of the issuance or continuance of an injunction is not broken so as to make the surety liable until the amount of the damage is assessed and determined and the principal obligor has refused to pay the amount awarded.²¹

§ 301. The Damages. While there is no fixed and certain general rule by which the damages upon the disso-

18. *Daly v. Gibson*, 29 Ark. 472; *Clayton v. Martin*, 31 Ark. 217.

19. *Hughes v. Hughes*, Adm., 4 Monr. 43. See however, *Green v. Hughes*, 23 La. Ann. 704.

20. *Poillon v. Volkenning*, 11 Hun, 385; *Shenandoah Nat. Bank v. Read*, 86 Ia. 136; *Jordan v. Volkenning*, 72 N. Y. 300; *Towle v. Towle*, 46 N. H. 431; *McAllister v. Clark*, 86 Ill. 236.

21. See *Bien v. Heath*, 12 How. (U. S.) 168. That the federal court in chancery has power to assess the damages on an injunction bond in the injunction proceeding, see *Tyler Min. Co. v. Last Chance Min. Co.*, 90 Fed. 15, 32 C. C. A. 498; *Leslie v. Brown*, 90 Fed. 171, 32 C. C. A. 556, with which compare *Bien v. Heath*, *supra*. See also *Toledo, St. Louis, etc. R. Co. v. St. Louis, etc. Co.*, 208 Ill. 633; *Fears v. Riley*, 147 Mo. 453.

lution of an injunction may in all cases be determined, it is well settled that nothing will be allowed which is not the natural and proximate results of the suspension or invasion of the defendant's rights. Damages which are remote, contingent and speculative merely, will not be allowed.²² Thus, remote and contingent benefits that might have accrued from the increased value of property resulting from the opening of a street will not be taken into account.²³ If no damages are shown none will be allowed.²⁴ But where the sale of property is enjoined, and pending such delay, depreciation occurs in its value, such loss being regarded as occasioned by the injunction, should be included in the estimate of damages.²⁵ In assessing the damages sustained, a reasonable sum may be allowed for expenses and trouble incurred in procuring a dissolution.²⁶ Damages cannot be awarded, however, for defendant's own time and service in attending to the case, or for the mental strain and anxiety suffered by reason of the injunction.²⁷ Where the payment of money justly due has been enjoined, interest is recoverable as a matter of right.²⁸ Where the defendant has been deprived of the use of his property, real or personal, by an interlocutory injunction, its rental value, or the value of the use, will ordinarily be the measure of damages,²⁹

22. *Collins v. Sinclair*, 51 Ill. 328; *Brown v. Jones*, 5 Nev. 374; *Steuart v. State*, 20 Md. 97; *Center v. Hoag*, 52 Vt. 401; *San Jose Fruit Packing Co. v. Curry*, 133 Cal. 327; *Elms v. Wright-Blodgett Co.*, 106 La. 19; see the opinion of Brett, L. J., in *Smith v. Day*, 21 Ch. D. 421, and cases throughout this section.

23. *Steuart v. State*, *supra*.

24. *Urich v. St. Louis*, 47 Mo. 528; *Bank of Monroe v. Gifford*, 70 Ia. 580. Nominal damages merely will not be allowed. *Smith v. Day*, 21 Ch. D. 421; *Foster v. Stafford Nat. Bank*, 58 Vt. 658.

25. *Meysenburg v. Schlieper*, 48 Mo. 426.

26. *Pargond v. Morgan*, 2 La. 100.

27. *Cook v. Chapman*, 41 N. J. Eq. 152. See also, *Edwards v. Bodine*, 11 Paige (N. Y.), 223.

28. *Wallace v. Dilley*, 7 Md. 237.

29. *Dreyfus v. Peruvian Guano Co.*, 42 Ch. Div. 66; *DeCamp v. Bullard*, 159 N. Y. 450; *Allen v. Brown*, 5 Lans. (N. Y.) 511; *Fleming v. Bailey*, 44 Miss. 132; *Sturges v. Knapp*, 36 Vt. 439.

and damages for waste committed in the meantime may be awarded.³⁰ Evidence that defendants lost their crop by reason of being kept out of possession by the injunction has been held admissible.³¹ If a sale of lands is delayed by injunction, interest on the purchase price during the period of delay has been allowed.³²

Reasonable counsel fees will, in most courts, be allowed as damages, though the award will be confined to such fees as were incurred in procuring the dissolution of the injunction as distinguished from such as were incurred in other branches of the case.³³

Further discussion of this matter is impossible within available limits of space, for it is obvious that the losses and injuries that may flow from the operation of the writ are as various the subjects that may be affected by its restraint.³⁴

30. *Richardson v. Allen*, 74 Ga. 719.

31. *Edwards v. Edwards*, 31 Ill. 474.

32. *Hill v. Thomas*, 19 S. Car. 230.

33. *Barrens v. McKenzie*, 23 Ia. 333; *Corcoran v. Judson*, 24 N. Y. 106; *Derry Bank v. Heath*, 45 N. H. 524; *Noble v. Arnold*, 23 Oh. St. 264; *Langworthy v. McKelvey*, 25 Ia. 48; *Blair v. Reading*, 99 Ill. 600; *Randall v. Carpenter*, 88 N. Y. 293; *Allport v. Kelly*, 2 Mont. 343; *Cook v. Chapman*, 41 N. J. Eq. 152. But see *Oelrichs v. Spain*, 5 Wall. (U. S.) 211; *Frantz v. Saylor*, 12 Okla. 39; *Wisecarver v. Wisecarver*, 97 Va. 452.

34. See 2 *Suth. on Dam.* (2d Ed.) sec. 526 et seq.

CHAPTER XXXI.

BAIL.

§ 302. **Definition and Nature.** It is not our purpose to discuss the law and practice regarding bail, civil or criminal, further than may be necessary to a general understanding of the rights and liabilities of sureties in bail.

As a substantive the word bail signifies those persons who become sureties for the appearance of a defendant in court, and in whose friendly custody he is supposed to be pending the time when his appearance is required.¹ As a verb it signifies the delivery of a defendant into the custody of the sureties upon his bail, bond or recognizance.² These definitions are applicable to both civil and criminal cases.

1. Bail are in the nature of sureties with the rights and remedies of other sureties. *Culliford v. Walser*, 158 N. Y. 65, 70 Am. St. R. 437.

2. See 1 Bouv. Law Dic. (Rawles' Ed.) 209; 1 Bish. New Cr. Proc. sec. 248; see, also, *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *State v. Western Surety Co.*, 26 S. Dak. 170, 175. Under the English practice, a defendant lawfully arrested in a civil action was required to give a bond to the sheriff called bail to the sheriff, bail below, or appearance bail, whereby he and his sureties were bound that he would afterward, at the proper time, enter into a recognizance with sureties that he would either pay the debt or damages or render himself to prison in satisfaction thereof, in default of which the sureties were liable. This later obligation was known as bail above, bail to the action or special bail, and if not forthcoming the plaintiff could proceed against the sheriff leaving him to proceed against the bail below, or take an assignment from the sheriff, and proceed against the bail below directly on the bond. 3 Stephen's Com. 543, 544. *De Myer v. McGonegal*, 32 Mich. 120, 124 et seq.; *Com. v. Baxter*, 235 Pa. St. 179, 183. In many of our states, bail to the sheriff is the only kind known and stands in lieu of bail above or bail to the action. *Toles v. Adees*, 84 N. Y. 222; *De Myer v. McGonegal*, supra. The whole matter of bail, particularly in civil actions, is largely regulated by statutes and civil bail is necessarily of diminished importance since the quite abolition of imprisonment for debt and the confinement of arrest in civil cases to certain actions ex delicto.

When bail is given the defendant is regarded as delivered into the custody of his sureties, and their dominion over him is deemed in point of law a continuance of the imprisonment. Whenever they choose to do so they may deliver him up in their own discharge, and if that cannot be done immediately, they may imprison him until it can.³ They may pursue him into another state and arrest him there,⁴ may arrest him on the Sabbath,⁵ and may, if necessary, break and enter his house for that purpose.⁶ No new process is needed. The action of bail in such cases has been likened to that of a sheriff rearresting an escaping prisoner.⁷ They may act by deputy who cannot act by deputy, though he may employ assistants who must act in his presence.⁸ The bail may command the services of the sheriff in making the

The right of the defendant in criminal cases to have his liberty upon giving bail pending trial, is secured in most states by familiar constitutional provisions, save in capital cases where the proof is evident or the presumption great, and excessive bail is prohibited. See *Bish. New Crim. Proc.* secs. 252, 255 et seq.

3. *Parker v. Bidwell*, 3 Conn. 84; *Taylor v. Taintor*, supra.

4. *State v. Lingerfelt*, 109 N. Car. 775, 14 L. R. A. 605 and note; *Com. v. Brickett*, 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Worthen v. Prescott*, 60 Vt. 68. But see *Republica v. Gasler*, 2 Yeates (Pa.) 263. In *Worthen v. Prescott*, supra, the court, in speaking of the authority of bail over their principal, say: "The authority of bail arises more from contract than from law; and as between the parties, neither the jurisdiction of the court nor of the state controls it; and so bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another, according to the law prevailing there. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves." Compare, *Reese v. U. S.*, 9 Wall. 13.

5. *Anonymous*, 6 Mod. 231; *Com. v. Brickett*, 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145.

6. *Com. v. Brickett*, supra. *Nicolls v. Ingersoll*, supra; *Read v. Case*, 4 Conn. 166, 10 Am. D. 110.

7. See *Taylor v. Taintor*, 16 Wall. (U. S.) 209; *Com. v. Brickett*, supra; *State v. Beebe*, 13 Kan. 589, 19 Am. R. 93.

8. *State v. Mahon*, 3 Harr. (Del.) 568. See *State v. Lingerfelt*, 109 N. Car. 775, 14 L. R. A. 606; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145.

arrest⁹ and if the sheriff refuses to act the sureties are released.¹⁰

§ 303. Form and Requisites of the Undertaking—Bail Bond—Recognizance. The sureties may become bound either upon a technical bail bond or a recognizance, depending usually upon the provisions of the statutes.

A bail bond is a specialty by which the defendant and his sureties become bond for his due appearance to answer to the writ or abide by the judgment of the court, and must, in order to be valid, have all the elements of a specialty, at least in the absence of statute dispensing with them.¹¹

A recognizance is an obligation of record entered into by the principal, or by the principal and his sureties, before a court or officer duly authorized, to appear for trial or do some other act required by law. Being an obligation of record it does not need to be signed or sealed unless the statute requires it,¹² and is not within the provisions of the statute of frauds.¹³

Sometimes the statute prescribes the form of the bond or recognizance and if it fails to conform substantially to the requirements of the statute, it may be void. But those statutory requisites of a bail bond or recognizance that are not meant for the protection of the defendant or his sureties are ordinarily construed as directory and noncompliance will not invalidate the bond. Thus if only one surety is taken where the statute requires two, the bond is nevertheless good, and similarly where the statutes requires the sureties to be residents of

9. *State v. Cunningham*, 10 La. Ann. 393; *Com. v. Brickett*, 8 Pick. (Mass.) 138.

10. *Com. v. Overby*, 80 Ky. 208, 44 Am. R. 471.

11. See *Williams v. State*, 25 Fla. 734, 6 L. R. A. 821.

12. The distinction between a bond and a recognizance substantially as above stated is affirmed and discussed in *People v. Barrett*, 202 Ill. 287, 63 L. R. A. 82, 95 Am. St. R. 230; *Swan v. U. S.*, 3 Wyo. 151; *Cole v. Warner*, 93 Tenn. 155.

13. *Grinestaff v. State*, 53 Ind. 238.

the state,¹⁴ or that they shall not be attorneys-at-law,¹⁵ or shall justify.¹⁶ If, however, the officer or magistrate taking bail exacts an obligation with more onerous conditions than the law prescribes as a condition of giving the defendant his liberty, the bond will ordinarily be void as exacted under a species of duress and a violation of the policy of the statute, the object of which is the protection of those deprived of their liberty.¹⁷ Though this rule is applicable to civil actions, an obligation valid at common law, given by the defendant in consideration that the plaintiff will free him from arrest, is valid as a common law obligation in the hands of the plaintiff, it being in no sense given under duress, the bond being accepted by the plaintiff at the solicitation of the defendant and not given under any exaction of the sheriff.¹⁸

In criminal cases, the offense must usually be described in the bond, though not, of course, with the particularity necessary in an indictment or information.¹⁹ The time and place for appearance must be definitely specified,²⁰ and if the day named is one on which there

14. *State v. Baker*, 50 Me. 45; *Commonwealth v. Ramsey*, 2 Duv. (Ky.) 385; *Long v. Billings*, 9 Mass. 482.

15. *Jack v. People*, 19 Ill. 57.

16. *People v. Carpenter*, 7 Cal. 402; *State v. Emily*, 24 Ia. 24. As to the effect of failure to file or record a bail bond the decisions are conflicting. See *Maxcy Co. v. Bowle*, 96 Me. 435.

17. *Bacon Ab.*, Sheriff, O; *Tucker v. Davis*, 15 Ga. 573; *Loyd v. McTeer*, 33 Ga. 37; *Shuttlesworth v. Levi*, 13 Bush (Ky.), 195; *Clark v. Walker*, 25 N. Car. 181; *Toles v. Adee*, 84 N. Y. 222, and authorities cited and discussed. If the statute declares that a bond in other than the statutory form shall be void it will be of no effect. *Shuttlesworth v. Levi*, *supra*; *Cook v. Freudenthal*, 80 N. Y. 202.

18. *Toles v. Adee*, *supra*. See *Bell v. Pierce*, 146 Mass. 58.

19. See *Young v. People*, 18 Ill. 566; *People v. Dennis*, 4 Mich. 609, 69 Am. D. 338; *Browder v. State*, 9 Ala. 58; *Wills v. State*, 4 Tex. App. 613; *State v. Merrihew*, 47 Ia. 112; *Com. v. Daggett*, 16 Mass. 447.

20. *State v. Allen*, 33 Ala. 422; *People v. Carpenter*, 7 Cal. 402; *Wheeler v. State*, 21 Ga. 153; *Mooney v. People*, 81 Ill. 134; *Brite v. State*, 24 Tex. 219. A change of venue from one state court to another will not affect the bond. *Ramey v. Com.*, 83 Ky. 534. Neither is it discharged by removal of the cause to a federal court pursuant to law. *Davis v. South Carolina*, 107 U. S. 597.

is by law no court the recognizance will be void.²¹

§ 304. Liability of Bail—Breach and Forfeiture of Bond—Exoneration. Civil bail stand in the place of the principal and cannot be relieved from their obligation, unless the cause of action is in some way satisfied, on any other terms than payment of principal, interest and costs, or the surrender of the principal in accordance with the terms of their undertaking.²² But they are not co-sureties with prior sureties, and prior sureties who pay the debt are entitled to subrogation to the remedies of the creditor against the bail.²³

Where the sureties upon a bail bond or a recognizance have surrendered their principal into custody pursuant to its conditions, they are of course exonerated and their liability does not revive upon his subsequent escape;²⁴ and the same is of course true where the principal appears in conformity with the conditions of the bond. But appearance alone is not sufficient where the condition is that the principal will abide the judgment. In such case he must hold himself in readiness to submit to the judgment of the court.²⁵

In criminal cases the liability of bail for the appearance of the principal depends largely upon the terms of their undertaking, though the construction of the bond

21. *State v. Sullivant*, 3 Yerg. (Tenn.) 281; *Thurston v. Com.*, 3 Dana (Ky.), 225; *Com. v. Bolton*, 1 Serg. & R. (Pa.) 328; *Com. v. Parker*, 140 Mass. 439; *Pike v. Neal*, 73 Me. 513.

22. *Parsons v. Briddock*, 2 Vern. 608; *Davidson v. Taylor*, 12 Wheat. (U. S.) 604; *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 220, 12 Am. D. 228. The offer of the principal voluntarily to surrender himself in discharge of his sureties releases them. *Babb v. Oakley*, 5 Cal. 93; *Dick v. Stokes*, 1 Dev. (N. Car.) 91.

23. Ante, sec. 152, and cases cited; *Parsons v. Briddock*, supra; *Culliford v. Walser*, 158 N. Y. 65.

24. *Kellogg v. State*, 43 Miss. 57; *Boswell v. Colquitt*, 73 Ga. 63. If the bail request the sheriff to arrest their principal, and accompany such request with a copy of the bond, and the arrest can be made, they are exonerated though the sheriff neglects to arrest him.

25. See *Billings v. Avery*, 7 Conn. 236; *Dunbarton v. Palfrey*, 27 N. H. 171; *Hewins v. Currier*, 62 Me. 236; *Babb v. Oakley*, 5 Cal. 93; *Hewins v. Currier*, 62 Me. 236.

will frequently be influenced by statute. In felony a personal appearance is required, though in misdemeanors this rule has been relaxed, at least in some jurisdictions.²⁶

The effect of an adjournment depends upon the conditions of the obligation. If the condition is substantially that the accused will appear and answer and not depart without leave, or that he will abide the order and judgment of the court, his appearance at legal adjournments from day to day or from term to term is required at the peril of forfeiture.²⁷ But where the obligation is for the appearance of the principal at a particular term, it seems that the sureties are liable for his appearance at that term only and cannot be held for his failure to appear at a subsequent term to which the case has been continued.²⁸ Where the condition is for appearance at the "next term," however, the sureties are bound for the appearance of their principal at subsequent succeeding terms to which the case is regularly adjourned according to the exigencies of the business of the court.²⁹ But the rule does not apply where the case is adjourned or continued to a term beyond the next succeeding regular one unless the sureties consent.³⁰

26. See *State v. Johnson*, 82 Kan. 450 and note thereto in 27 L. R. A. (N. S.) 943, where the decisions are reviewed.

27. *Ellison v. State*, 8 Ala. 273; *Hortsell v. State*, 45 Ark. 59; *Gallagher v. People*, 88 Ill. 335, 91 Ill. 590; *Rubush v. State*, 112 Ind. 107; *People v. Hanan*, 106 Mich. 421. See also *State v. Horton*, 123 N. Car. 695.

28. But an order subsequently entered changing the date of that particular term will not discharge the bail. *State v. Aubrey*, 43 La. Ann. 188.

29. *Stokes v. People*, 63 Ill. 489; *People v. Hanan*, 106 Mich. 421; *Rubush v. State*, 112 Ind. 107; *State v. Benzion*, 79 Ia. 467; *Ramey v. Com.*, 83 Conn. 534. But see *Colquitt v. Smith*, 65 Ga. 341.

30. *Reese v. United States*, 9 Wall. (U. S.) 13. In this case there was a stipulation without the consent of the sureties that the criminal prosecution should stand over until certain civil cases were decided. The principle applied was that the sureties had a right to stand upon the strict terms of their undertaking.

§ 305. Act of God as Exonerating Bail. The death of the principal before breach of their bond exonerates the sureties in bail. In this respect their undertaking, being required by law, differs from an absolute promise voluntarily given, which may not be discharged by the act of God.³¹

The illness of the defendant which actually suspends his capacity to perform legal duties, or which would put his life in jeopardy by an attempt to perform the conditions of the obligations, will exonerate the bail so long as the disability lasts.³²

§ 306. Exoneration of Bail by Act of Law. If the act for the performance of which bail is responsible is subsequently rendered illegal by act of the law, the bail are discharged. Thus civil bail are discharged by the abolition of imprisonment for debt, if such abolition takes place before their obligation is forfeited.³³

§ 307. Same—Subsequent Imprisonment of Principal—Pardon. Civil bail have been held discharged by the arrest and imprisonment of the principal in the same state before forfeiture, on a criminal charge, upon the ground that they are thus prevented by act of the law from surrendering him pursuant to their undertaking;³⁴

31. *Paynes v. State*, 45 Ala. 52; *Scully v. Kirkpatrick*, 79 Pa. St. 324, 21 Am. St. R. 62; *Mathis v. People*, 12 Ill. 9; *State v. Cone*, 32 Ga. 663; *Connor v. State*, 30 Tex. 94. But see *Hamilton v. Dunkle*, 1 N. H. 172; *State v. Traphagen*, 45 N. J. Law, 134.

32. *Blackwell v. Wilson*, 2 Rich. Law (S. Car.), 322; *Scully v. Kirkpatrick*, *supra*. So held where the principal was confined as a lunatic in an asylum. *Fuller v. Davis*, 1 Gray (Mass.), 612; *Com. v. Fleming*, 15 Ky. Law, 419. Contra, *Adler v. State*, 35 Ark. 517, 37 Am. R. 48.

33. *White v. Blake*, 22 Wend. (N. Y.) 612; *Kelly v. Henderson*, 1 Pa. St. 495; *Parker v. Sterling*, 10 Ohio, 357. See *Lewis v. State*, 41 Miss. 585. So bail in a criminal case is usually discharged if the principal is again arrested on the same charge, or if by virtue of such arrest he is taken from the control of the bail. *Peacock v. State*, 44 Tex. 11; *Medlin v. Com.*, 11 Bush (Ky.), 605.

34. *Way v. Wright*, 5 Met. (Mass.) 380; *Canby v. Griffin*, 3 Harr. (Del.) 333; *Belding v. State*, 25 Ark. 315, 99 Am. D. 214, and note. In S. S. 27

and it has been held on similar grounds that criminal bail are likewise released by the arrest and imprisonment of the principal and his detention at a different place until after the time for appearance designated in his bond,³⁵ though the weight of authority seems to favor a contrary view where there is simply an arrest and detention in another county of the state, for the bail may secure him on habeas corpus and deliver him to the proper authorities.³⁶ The taking of new bail in a criminal case, however, discharges the old, as their custody is superseded in favor of the new sureties.³⁷

Where, however, the principal, accused of crime and liberated on bail in one state, goes into another and is there arrested or imprisoned for crime, one line of authorities holds that the bail are not released, and this was held where the defendant had gone into another state from whence he had been removed to a third state by extradition proceedings.³⁸ But the contrary has been held in a number of cases.³⁹ Clearly, where one released on bail in one state is yielded up by it on extradition proceedings to another state, his bail are released.⁴⁰

this last case the arrest was by military authority. *Comp. Phoenix Fire Ins. Co. v. Mowatt*, 6 Cow. (N. Y.) 599.

35. *People v. Bartlett*, 3 Hill (N. Y.) 570; *Commonwealth v. House*, 13 Bush (Ky.) 679; *Woods v. State*, 51 Tex. Cr. R. 595; *State v. Row*, 89 Iowa, 581; *People v. Robb*, 98 Mich. 397; *Buffington v. Smith*, 58 Ga. 341; *Cooper v. State*, 5 Tex. App. 215, 32 Am. Rep. 571. See *Wheeler v. State*, 38 Tex. 173.

36. *Ingram v. State*, 27 Ala. 17; *State v. Merrihew*, 47 Ia. 112, 29 Am. R. 464; *Harris v. State*, 62 Ark. 500; *Wheeler v. State*, 38 Tex. 173.

37. *State v. Becker*, 80 Wis. 313, 317, and authorities cited.

38. *Taylor v. Taintor*, 16 Wall. (U. S.) 366. See, also, in accord, *In re Fitton*, 55 Fed. Rep. 272; *United States v. McGlashen*, 66 Fed. Rep. 538; *King v. State*, 18 Neb. 390; *Steelman v. Mattix*, 38 N. J. L. 247, 249; *Ingram v. State*, 27 Ala. 17; *State v. Crosby*, 114 Ala. 11; *State v. Horn*, 70 Mo. 466, 35 Am. R. 437; *Yarbrough v. Comm.*, 89 Ky. 151, 25 Am. St. R. 524, 527 and note; *Hartley v. Colquitt*, 72 Ga. 351; *State v. Scott*, 20 Ia. 63; *State v. Burnham*, 44 Me. 278.

39. See *Com. v. Overby*, 80 Ky. 208, 44 Am. R. 471.

40. *State v. Allen*, 21 Tenn. 258; *People v. Moore*, 4 N. Y. Cr. R. 205; and so if the principal is arrested by federal authority within the

A pardon granted before forfeiture in a criminal case exonerates the bail, provided such pardon is accepted by the defendant.⁴¹

§ 308. **Discharge of Principal in Bankruptcy.** As the discharge of the principal in bankruptcy or insolvency terminates his liability for the cause of action, and he would be entitled to be immediately released even if surrendered by his bail, such discharge of the principal before forfeiture releases the bail.⁴² The rule is otherwise, however, where the discharge is obtained after the bail have become fixed.⁴³

§ 309. **Same—Release of Bail by Alteration of Contract.** Bail, both in civil and criminal cases, are sureties, and like other sureties are entitled to stand upon the strict terms of their undertaking. If, therefore, the bond or recognizance is altered without their consent in any material particular, whether their risk be increased or not, they are released upon the same principles as other sureties;⁴⁴ and so if, by stipulation between the principal and the state, the time or place of appearance is changed without consent of the sureties.⁴⁵

state and imprisoned elsewhere for the same offense. *Com. v. Overby*, 80 Ky. 208, 44 Am. R. 471.

41. *Grubb v. Bullock*, 44 Ga. 379. *Contra*, if after forfeiture. *Dale v. Com.*, 101 Ky. 612, 38 L. R. A. 808. The enforced service of the principal in the army or navy making his surrender impossible exonerates his bail. *Com. v. Webster*, 1 Bush (Ky.), 616; *People v. Cushney*, 44 Barb. (N. Y.) 118; *Alford v. Irvine*, 34 Ga. 25. But the rule is otherwise where the enlistment is voluntary. *Lamphire v. State*, 73 N. H. 463, 6 Ann. Cas. 615. See, also, *Shook v. People*, 39 Ill. 443.

42. *Worley v. Cobble*, 1 Burr. 245; *Beers v. Haughton*, 1 McLean (U. S.) 224; *Rowland v. Stevenson*, 6 N. J. L. 149; *Belknap v. Davis*, 21 Vt. 209; *People v. Hathaway*, 206 Ill. 42, and cases cited and discussed. See also, *Com. v. Riddle*, 1 Serg. & R. (Pa.) 311.

43. *Munroe v. Powers*, 2 Cranch (U. S.), 187; *Levy v. Nicholas*, 19 Abb. Pr. (N. Y.) 282; *Franklin v. Thurber*, 1 Cow. (N. Y.) 427.

44. *Reese v. United States*, 9 Wall. (U. S.) 13; *Grant v. State*, 8 Tex. App. 432.

45. *Reese v. U. S.*, *supra*.

§ 310. **Relief From Forfeiture.** Though there has been a technical breach and forfeiture of the bail bond or recognizance in a criminal case, the courts, and in some states the executive, may sometimes relieve against it where no substantial right of the state has been impaired, and the object of the bond or undertaking has been substantially attained, and the bail are guilty of no intentional breach or evasion of duty.⁴⁶ The power to remit the forfeiture of a recognizance in criminal cases is held in this country to be a common law power of the courts,⁴⁷ to be exercised in accordance with judicial discretion, and the remission may be in full or in part according to the circumstances of the case. In general, the courts will grant relief whenever the default was due to the disabling illness of the defendant,⁴⁸ or to any other disabling or preventing cause where it appears that the default was not wilful or negligent,⁴⁹ or the default was not connived at by the bail,⁵⁰ and the defendant is subsequently surrendered and is tried.⁵¹

In some jurisdictions, however, relief will not be granted until a trial has resulted in conviction, or where it appears after an acquittal or the entry of a *nol. pros.* that the prosecution was not hampered by the delay.⁵² Payment of costs and expenses is an invariable condition of the remission.

46. See *Rex v. Tomb*, 10 Mod. 278; *U. S. v. Feely*, 1 Brock (U. S.) 255; *Rawlings v. State*, 38 Neb. 590. In some states by statute the surrender of the principal by his bail before final judgment will *ipso facto* exonerate them upon payment of costs.

47. *U. S. v. Feely*, *supra*; *State v. Clifford*, 124 Mo. 492.

48. See *U. S. v. McGlashen*, 66 Fed. 537; *Rawlings v. State*, 38 Neb. 590; *State v. Lingerfelt*, 109 N. Car. 775, L. R. A. 605n. Compare *State v. Sandy*, 138 Ia. (1908) 580.

49. *U. S. v. McGlashen*, *supra*. *Hangsleben v. People*, 89 Ill. 164; *Wray v. People*, 70 Ill. 664; *State v. Sandy*, *supra*. *Fuller v. Davis*, 1 Gray (Mass.), 612, with which compare *Adler v. State*, 35 Ark. 517.

50. *People v. Petry*, 2 Hilt. (N. Y.) 523.

51. *Johnson v. State*, 64 Ga. 442.

52. *People v. Madden*, 16 Daly (N. Y.), 63; *State v. Saunders*, 8 N. J. L. 177; *People v. Carey*, 5 Daly (N. Y.), 533.

§ 311. **Reimbursement and Indemnification of Bail.** Ordinary sureties are, as we have seen, entitled to be indemnified by their principals for whatever they are compelled to pay on account of the default of the latter.⁵³ Bail in civil cases are in the position of other sureties in this respect and are entitled to be reimbursed by the principal for whatever they may have paid by virtue of their liability as bail,⁵⁴ and are entitled to be subrogated to the rights of the plaintiff against the principal. The right to indemnity, however, does not extend to those who are jointly liable with the principal as where he is arrested for a firm debt, though they may be ultimately liable for contribution to the latter.⁵⁵

The object of bail in criminal cases, however, is to secure the appearance of the principal to answer for an act punishable upon public grounds and for the public protection, and it is regarded by some courts as contrary to public policy as tending to frustrate the administration of criminal justice by destroying the personal interest that the sureties have in producing their principal for trial, that bail should be permitted to enforce indemnity against their defaulting principal, upon the basis of an implied contract.⁵⁶ Indeed, a recent English case goes further and holds an express contract between the defendant and his bail, whereby they were to be indemnified so that they would lose nothing if he absconded, constitutes a criminal conspiracy in itself, though there was no proof of intent on the part of the sureties that the defendant should abscond.⁵⁷ But it

53. Ante, secs. 117, et seq.

54. *Fisher v. Fallows*, 5 Esp. 171; *Parsons v. Briddock*, 2 Vern. 608; *Adair v. Campbell*, 4 Bibb (Ky.), 13; *Buel v. Gordon*, 6 Johns. (N. Y.) 126.

55. *Cunningham v. Clarkson*, Wright (Oh.), 217; *Osborn v. Cunningham*, 20 N. Car. 559; *Bowman v. Blodgett*, 2 Met. (Mass.) 308.

56. *U. S. v. Ryder*, 110 U. S. 729, arguendo in denying the right to subrogation under an implied contract of indemnity or even under an express one.

57. *Rex v. Porter*, 1910, 1 K. B. 369, disapproving *Reg. v. Broome*, 18 L. T. (O. S.) 19. In *Herman v. Jeucher*, 15 Q. B. Div. 561, it was

has been held in New York, in view of a statute making a cash deposit equivalent to bail, that there is no public policy forbidding the indemnification of bail, and that a bond and mortgage for their indemnification are valid,⁵⁸ and in South Dakota, under a similar statute, a bond of indemnity against liability upon an undertaking in a criminal action has been upheld.⁵⁹

In civil bail the sureties upon the bond of the defendant are not, upon payment, entitled to be subrogated as against a surety for the debt. On the contrary a surety for a debt who has been compelled to pay may be subrogated to a judgment recovered against the bail on the ground that, though sureties for the principal, they virtually, stood in the room of the principal so far as the sureties were concerned, and interfered with the enforcement of the debt as against him.⁶⁰

§ 312. Ne Exeat Bonds. The writ of ne exeat, ne exeat regno, or ne exeat republica, as at present employed, is in the nature of equitable bail, whereby a court having equity powers may cause a party against whom a personal equitable pecuniary demand exists, to be arrested and held in custody until he gives bond with sufficient sureties, either that he will not depart the state (or coun-

held that a plaintiff could not recover cash deposited with his bail for their indemnity, on the ground that the transaction was illegal. See, also, *Jones v. Orchard*, 16 C. B. 614; *U. S. v. Simmons*, 47 Fed. 575, 14 L. R. A. 78 and note.

58. *Maloney v. Nelson*, 158 N. Y. 351.

59. *Western Surety Co. v. Kelley*, 131 N. W. (1911) 131, citing *Maloney v. Nelson*, supra. It should be noted here that there is no common law authority for the taking of cash bail, and such bail, if given in the absence of statutory authority, cannot be recovered from the sheriff. *Smart v. Carson*, 50 Ill. 195. It cannot be retained by the sheriff, however, but should be paid to the county. *Rock Island v. Mercer Co.*, 24 Ill. 35.

60. Ante, sec. 152; *Sheldon*, Subrogation, sec. 131, and cases cited; *Parsons v. Briddock*, 2 Vern. 608; *Potts v. Nathans*, 1 W. & S. (Pa.), 155; *Hanner v. Douglass*, 4 Jones Eq. (N. Car.) 262; *Culliford v. Walser*, 158 N. Y. 66, and cases cited and discussed.

try) without leave of court, or that if he does he will pay the sum in which he may eventually be condemned.⁶¹

It is not our purpose to discuss the practice with respect to the issuance of the writ further than to say that it is not a prerogative writ with us, but a mere process to procure equitable bail, issued ex parte upon affidavit showing legal grounds therefor. It is perhaps most commonly used at the present time to secure the payment of alimony,⁶² though it is often issued upon a bill for an account.⁶³

The writ issues upon affidavit, which must usually show an equitable demand due, and that the defendant is about to dispose of or is about to remove his property, and is about to leave the state.⁶⁴

The bond binds the sureties only to the extent of the final decree, and if the defendant remains continually within the district according to its conditions, the sureties are discharged.⁶⁵

61. See Daniels's Ch. Prac. (6 Am. Ed.) 1698; 2 Story Eq. Jur. Secs. 1465, 1475, where the nature of the writ and the practice with respect thereto are discussed; See, also, Adams v. Whitcomb, 46 Vt. 708; Cable v. Alvord, 27 Oh. St. 654; Gresham v. Peterson, 25 Ark. 377; Bleyer v. Blum, 70 Ga. 558; Moore v. Valda, 151 Mass. 363, 7 L. R. A. 396, and note; State v. Turner, 145 Wis. 484.

62. See Lamar v. Lamar, 123 Ga. 827, 107 Am. St. R. 169. Courts of bankruptcy may issue to carry out the provisions of the bankruptcy act. In re Cohen, 136 Fed. 999.

63. Lamar v. Lamar, *supra*; Dean v. Smith, 23 Wis. 483.

64. Dean v. Smith, *supra*; Rhodes v. Cousins, 6 Rand. (Va.) 188; Williams v. Williams, 3 N. J. Eq. 130. See, also, 3 Daniels Ch. Pr. (6th Am. Ed.) 2164.

65. Zantzinger v. Weightman, 2 Cranch C. C. 478.

CHAPTER XXXII.

SURETIES OF EXECUTORS AND ADMINISTRATORS.

§ 313. **In General—When Bond Required.** Administrators, both in England and in this country, are uniformly required to give bonds with sufficient sureties for the faithful performance of their trusts.¹ Upon the theory, however, that the executor derived his authority from the testator rather than from the ordinary,² the spiritual courts refused to require bonds of him even though he was insolvent or was guilty of devastavit. On this account chancery, for the protection of widows and orphans, was early compelled to assume jurisdiction to exact bonds with sureties from the insolvent, neglectful or unfaithful executor.³ With us, ordinarily, the powers of chancery, as well as the jurisdiction of the spiritual courts with respect to the bonds of executors and administrators is vested in courts having probate jurisdiction, and while the English rule permitting an executor to act without giving bonds in the first instance prevails in some states, it is otherwise in most of them unless the will expressly dispenses with security.⁴ Even in the latter case, the court has power independent of statute to require security of the executor where he is insolvent, or has been guilty of breach of trust, or where there is some other good reason why security should be given;⁵ and by statute in many states the court may exact se-

1. Schouler's Exrs. & Admrs. secs. 139, 140; *Feltz v. Clark*, 4 Humph. (Tenn.) 79.

2. *Saxe v. Saxe*, 119 Wis. 557, and authorities cited.

3. 4 Burn's Ecc. Law, 176; Schouler, Exrs. & Admrs. sec. 137; Williams on Exrs., 7th Ed. 273; *Slanning v. Style*, 3 P. Wms. 334; *Bellinger v. Thompson*, 26 Ore. 320.

4. See *Fairfax v. Fairfax*, 7 Grat. (Va.) 36.

5. *Gibson v. Gishback*, 22 Ky. L. 1267; See also *Bankhead v. Hubbard*, 14 Ark. 298; *Gray v. Gaither*, 74 N. Car. 237.

curity in its discretion in any case where it appears proper to do so.⁶ In a few states a bond must be given in all cases notwithstanding the provisions of the will.⁷

The giving of the security prescribed by the court, whenever it is legally required, is ordinarily necessary before the executor or administrator is qualified to act.⁸

Even where no bond has been exacted,⁹ or the court was without jurisdiction to require it,¹⁰ a bond voluntarily given is good as a common law obligation where it contains nothing unauthorized by law or contrary to public policy.¹¹

§ 314. Form and Requisites of Bond. The statutes or rules of court usually require a bond in double the amount of the estimated value of the personalty, and the courts commonly have power to require additional security or to reduce the amount of the security as the exigencies of the case may demand.

Usually, in this country two or more sureties are required upon executor's and administrator's bonds, though a single corporate surety is ordinarily authorized.

The form of the bond is usually provided for by statute and commonly runs to the probate judge and his successors, for which reason it is often termed a probate bond, a term also applied to guardianship bonds.¹²

6. See *Wells v. Child*, 12 Allen (Mass.), 330; *Freeman v. Kellogg*, 4 Redf. Sur. (N. Y.) 218; *Bellinger v. Thompson*, 26 Ore. 320. See also, *Felton v. Sowles*, 57 Vt. 382.

7. *Bankhead v. Hubbard*, 14 Ark. 298; *Heydock v. Duncan*, 43 N. H. 95. Whenever an executor gives bonds his liability thereon and that of his sureties is determined by practically the same rules as are applicable to the bonds of administrators. *Hood v. Hood*, 85 N. Y. 561.

8. *Schouler, Exrs. & Admsr.*, sec. 137, and cases cited; *Feltz v. Clark*, 23 Tenn. (4 Humph.) 79; *Heydock v. Duncan*, *supra*.

9. *State v. Creusbauer*, 68 Mo. 254.

10. *Folkes v. Docminique*, 2 Strange, 1137; *State v. Creusbauer*, *supra*; *Bellinger v. Thompson*, 26 Ore. 320.

11. *Post*, next section.

12. *Post*, sec. 336.

Substantial compliance with the statute requirements as to form is usually deemed sufficient, and immaterial departures from them will not invalidate the bond or defeat the appointment.¹³ The fact that the bond contains more than the statute requires will not invalidate it as a statutory bond;¹⁴ and though the bond is fatally defective as a statutory bond, it will ordinarily be upheld as a common law bond if it is voluntarily given and violates no rule of law or public policy.¹⁵

The conditions of the bond, whether of an executor or administrator, are usually in substance as follows:

1. To make and return to the court, within the time specified therein or by law, a true and perfect inventory of the estate of the deceased which shall come into the possession or to the knowledge of the principal.

2. To administer according to law or the will of the testator, all his goods, chattels, rights, credits and estate which shall at any time come to his possession or the possession of any other person for him, and out of the same to pay and discharge all debts, legacies, distributive shares and all charges on the same or such dividends thereon as shall be adjudged by the court.

3. To render to the court a true and just account of the administration within the time specified by the bond or the law, or at any other time, if required by the court.

13. *Probate Judge v. Claggett*, 36 N. H. 381, 72 Am. D. 314; *Lanler v. Irvine*, 21 Minn. 447; *Renfro's Admrs. v. Price*, 15 Mo. 375; *Ordinary v. Cooley*, 30 N. J. Law, 179; *Rose v. Winn*, 51 Tex. 545; *Pettingill v. Pettingill*, 60 Me. 411; *Newton v. Cox*, 76 Mo. 352. See, also, *Holbrook v. Bentley*, 32 Conn. 502.

14. *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Gondolfo v. Walker*, 15 Oh. St. 251; *Gibson v. Beckham*, 16 Gratt. (Va.) 321; *Woods v. State*, 10 Mo. 698. Compare *Cleaves v. Dockray*, 67 Me. 118 holding such a bond good merely as a common law obligation.

15. *Bellinger v. Thompson*, 26 Ore. 320; *Shalter's Appeal*, 43 Pa. St. 83, 82 Am. D. 552; *Hibbits v. Canada*, 18 Tenn. (10 Yerg.) 465. Compare *Wier v. Mead*, 101 Cal. 125, 40 Am. St. R. 46.

4. To perform all orders and judgments of the court.¹⁶

§ 315. Extent of Liability on Administration Bonds.

While the principal and sureties are equally liable upon an administration bond for breach of its conditions,¹⁷ the liability of the sureties is measured by the terms and conditions of the bond,¹⁸ the liability of the principal by the duties of his office, and if the bond given omits conditions required by law, they will not be supplied as against the sureties,¹⁹ though they will be binding in equity, it seems, as against the principal.²⁰

Furthermore, like sureties upon strictly official bonds, the sureties for an executor or administrator are liable for his official acts only, and for such funds or assets only as come to him in his official capacity.²¹

Usually, by the tenor of the bond, as we have seen, the executor or administrator is bound for debts and legacies only so far as the assets of the decedent, honestly, prudently and lawfully administered, will reach. But a bond conditioned for the payment of all debts and legacies, given by an executor who is sole or residuary legatee, has been construed to render him and his sureties liable for such payment, though the assets prove deficient.²²

16. See Stat. 21 Henry VIII, c. 5. sec. 3 and 23 Car. II, c. 10, and statutes of the several states. Public administrators are usually required to give bond covering all the estates coming to their hands in the course of their official duty.

17. Probate Judge v. Sulloway, 68 N. H. 511, 73 Am. St. R. 619, 49 L. R. A. 347.

18. Webster v. Thompson, 55 Ga. 431; People v. Huffman, 182 Ill. 390; Weir v. People, 78 Ill., 192; McDowell v. Jones, 58 Ala. 25; Waters v. Riley, 2 Harr. & G. (Md.) 305, 18 Am. D. 302; Grady v. Hughes, 86 Mich. 184.

19. Sinall v. Com., 8 Pa. St. 101; Barbour v. Robertson, 1 Litt. (Ky.) 93; Baltzell v. Hall, 1 Litt. (Ky.) 97.

20. Baltzell v. Hall, *supra*.

21. Wattles v. Hyde, 9 Conn. 10; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 178; Post, sec. 315.

22. Kreamer v. Kreamer, 52 Kan. 597; Hatheway v. Weeks, 34 Mich. 237; Lafferty v. People's Saving Bank, 76 Mich. 35; Stebbins v.

§ 316. **Estoppel of Sureties.** The sureties on an administration bond are estopped by its recitals, after it has been acted upon, to question the validity of the appointment of the principal, or the jurisdiction of the court to appoint him,²³ and they are likewise estopped, of course, to show any agreement among themselves or with their principal whereby their liability as fixed by the bond is in any way altered or impaired, unless the beneficiaries are parties thereto.

§ 317. **Property Covered by the Bond.** The sureties are liable not only for such property of the estate as actually came to the hands of the executor or administrator, but for all property or assets that he might have collected in the exercise of due and reasonable diligence;²⁴ and so as to assets received before as well as after the execution of the bond.²⁵

§ 318. **Same—Debts Due from Executor or Administrator.** Debts due from the executor or administrator to the deceased should be included in his inventory, and a failure to include them has been held a breach of the condition of the bond requiring him to make and file a true and complete inventory of the estate.²⁶

The extent of the liability of the sureties for such debts, however, is the subject of some conflict of authority. If the executor or administrator was solvent

Smith, 4 Pick. (Mass.) 97; Jones v. Richardson, 5 Met. (Mass.) 247. See, also, Holden v. Fletcher, 6 Cush. (Mass.) 235; Will of Cole, 52 Wis. 591.

23. Ante, sec. 49; Bigelow on Estoppel (5th Ed.), 373; Plowman v. Henderson, 59 Ala. 559; Cutler v. Dickinson, 25 Mass. 386; Moore v. Earl, 91 Cal. 632. But see Crum v. Wilson, 61 Miss. 233; Father Matthew Soc. v. Fitzwilliam, 84 Mo. 406.

24. Norton v. Ashbee, 46 N. Car. 312.

25. Choate v. Arrington, 116 Mass. 552; Chapin v. Waters, 110 Mass. 195. This would seem to include property received and wasted, converted or misapplied before appointment. Treweek v. Howard, 105 Cal. 434. See also the next section and cases cited in note 26.

26. See Wright v. Lang, 66 Ala. 389; Winship v. Bass, 12 Mass. 199; Wilson v. Rose, 3 Cranch C. C. 371; Chapin v. Waters, *supra*.

when the bond was given, the sureties are liable for such debts as for other assets of the estate, as for so much cash received, though he afterward becomes insolvent;²⁷ and by many authorities this rule obtains though the executor or administrator was insolvent during the entire period of the administration.²⁸

By the seeming weight of authority and reason, however, the sureties on an administration bond are not liable for debts due from their principal to his decedent where it appears that such principal was at all times during the administration insolvent and unable to pay, for why should the sureties be compelled to pay out of their own pockets what the decedent could not collect during his lifetime or have recovered had he lived.²⁹

§ 319. Same—Foreign Assets. Neither an executor or administrator or his bondsmen are liable for foreign assets unless they are actually received by him or brought into the state.³⁰

§ 320. Liability of Sureties on Bonds of Co-executors and Co-administrators. Co-executors and co-administrators are jointly liable for their joint acts, and separately

27. *Condit v. Winslow*, 106 Ind. 142; *Rader v. Yeargin*, 85 Tenn. 486; *State v. Gregory*, 119 Ind. 503.

28. *Wright v. Lang*, 66 Ala. 389; *Treweek v. Howard*, 105 Cal. 434; *Lambrecht v. State*, 57 Md. 240; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 199; *Bassett v. Fidelity Co.*, 180 Mass. 210, 100 Am. St. R. 552, and cases cited; *McGaughy v. Jacoby*, 54 Oh. St. 487, decided under statute; *Twitty v. Houser*, 7 S. Car. 153; *United Brethren v. Aiken*, 45 Ore. 427, 66 L. R. A. 654, and cases cited. See *Potter v. Titcomb*, 7 Me. 302; *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. R. 619; *Davenport v. Richards*, 16 Conn. 310.

29. *Condit v. Winslow*, 106 Ind. 142; *Sanchez v. Forester*, 133 Cal. 614; *Howell v. Anderson*, 66 Neb. 575, 61 L. R. A. 313; *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Spurlock v. Earles*, 67 Tenn. 437; *Rader v. Yeargin*, 85 Tenn. 486; *Sanders v. Dodge*, 140 Mich. 236, 112 Am. St. R. 399-n; *Lyon v. Osgood*, 58 Vt. 707.

30. *Cabanne v. Skinker*, 56 Mo. 357, with which compare *State v. Osborn*, 71 Mo. 86; *Fletcher v. Sanders*, 7 Dana (Ky.), 345, 32 Am. D. 96; *Governor v. Williams*, 3 Ired. L. (N. Car.) 152, 38 Am. D. 712. See, also, *Probate Judge v. Heydock*, 8 N. H. 491; *Strong v. White*, 19 Conn. 238; *Woodfin v. McNealy*, 9 Fla. 256.

liable for their separate acts, save that a co-executor or co-administrator may be liable for such wrongful acts of his associate as he might have prevented by the exercise of reasonable diligence.³¹ It follows from this that a co-executor or co-administrator is not a surety for his fellows, nor liable to indemnify the sureties on the administration bond for their defaults. It has therefore been held that one co-administrator, or those claiming under him, may maintain an action against the sureties on the bond for the sole default of his co-administrator injurious to the estate in which he had a beneficial interest. It is the same as if they had executed separate bonds with the same sureties upon each.³²

In the absence of statute, an ordinary administration bond does not cover the proceeds of sales of real estate or rents received after the decedent's death, even though they are brought into the administration account.³³

§ 321. Sureties of Executor or Administrator Liable for Official Misconduct Only. The sureties on the bond of an executor or administrator are liable for his official

31. 2 Woerner, Administration, sec. 348; *Wilmerding v. McKeeson*, 103 N. Y. 329; *Nance v. Oakley*, 120 N. Y. 84, affirming 37 Hun, 495; *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242, 253, *Hopk. Ch.* 309, 331; *English v. Newell*, 42 N. J. Eq. 76. See, however, *Dobyns v. McGovern*, 15 Mo. 662. See as to Joint Guardians, Post, sec. 340. The one is not a surety for the other though both join as principals in the statutory bond. *Nance v. Oakley supra*. Compare 34 Ind. 137.

32. *Nance v. Oakley, supra*; *Boyle v. St. John*, 28 Hun (N. Y.), 454. Compare *Hoell v. Blanchard*, 4 Desaus. (S. Car.) 21.

33. *Com. v. Hilgert*, 55 Pa. St. 236; *Brown v. Brown*, 2 Harr. (Del.) 56; *Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 49; *Reno v. Tyson*, 24 Ind. 56; *Hutcherson v. Pigg*, 8 Gratt. (Vt.) 220; *Cornish v. Willson*, 6 Gill (Md.), 299; *Beale's Exrs. v. Commonwealth*, 17 Serg. & R. (Pa.) 392; *Jones v. Hobson*, 2 Rand. (Va.) 483; *Burnett v. Harwell*, 3 Leigh (Va.), 89; *Gregg v. Currier*, 36 N. H. 200; *Perkins v. Perkins*, 46 N. H. 110, 112; *Powell v. White*, 11 Leigh. (Va.) 309; *Kimball v. Sumner*, 62 Me. 307; *Slaughter v. Froman*, 2 T. B. Monr. (Ky.) 95; *Allen v. Bruton*, 1 McMullan (S. C.), 249. As to the proceeds of lands sold under a power contained in the will, however, the sureties are liable, provided the sale is made for a purpose authorized by the will. See *White v. Ditson*, 140 Mass. 351.

misconduct only, and it makes no difference that he acts by order of the court, if the act is not an official one.³⁴ Thus, if one is appointed special commissioner to sell such property as he, as administrator, has no right to sell, his sureties as administrator are not liable for his failure to pay over the proceeds.³⁵ So the bond of an executor, who is also guardian, is not liable for his defaults in the latter capacity, though it is often a matter of some difficulty to determine when the responsibility as executor ceases and that of guardian begins.³⁶ Under similar principles, the sureties of an executor are not liable for his defaults as testamentary trustee unless the bond is broad enough to cover his acts in both capacities,³⁷ or the statute provides otherwise.

§ 322. What Constitutes Breach of Bond. Precisely what constitutes a breach of an administration bond must frequently depend upon its terms. In practically all cases, however, the failure to make and return a true and complete inventory of the estate of the decedent, within the time limited by law or the bond, is a breach for which an action will lie against the executor or administrator, or his sureties,³⁸ and a citation to make and return an inventory is unnecessary before action under the English statute and the statutes of several of our states.³⁹ Failure to inventory property which did not come to the knowledge of the administrator, however, as distin-

34. Ante, sec. 315; *Nelson v. Woodbury*, 1 Me. 251.

35. *Reeves v. Steele*, 2 Head (Tenn.), 647; *Gambill v. Campbell*, 12 Heisk. (Tenn.) 737.

36. On this point see post, sec. 341.

37. *White v. Ditson*, 140 Mass. 351; *Perkins v. Lewis*, 41 Ala. 649, 94 Am. D. 616; *Anderson v. McGowan*, 42 Ala. 280; *Walker v. Potilla*, 7 Lea (Tenn.), 449; *State v. Wilmer*, 65 Md. 178.

38. *Wms. Exrs.* (6th Am. Ed.) 606; *People v. Hunter*, 89 Ill. 392; *Gilbert v. Duncan*, 65 Me. 469; *Ellis v. Johnson*, 83 Wis. 394; *Com. v. Bryan*, 8 Serg. & R. (Pa.), 128; *Sherwood v. Hill*, 25 Mo. 351; see *McKim v. Harwood*, 129 Mass. 75.

39. *Bourne v. Stevenson*, 58 Me. 499; *Com. v. Bryan*, *supra*. Compare *Hurlburt v. Wheeler*, 40 N. H. 73.

guished from that which did, is not a breach of the bond.⁴⁰

§ 323. Same — Devastavit — Maladministration — Negligence. The sureties of an executor or administrator are liable for his devastavits, i. e., his waste or mismanagement of the estate, by reason of which a loss is incurred. This is clearly so, where the devastavit is due to his positive acts of conversion, or to his waste.⁴¹ But the sureties are equally liable where the estate suffers loss by reason of the failure of the executor or administrator to use care and diligence to get in,⁴² and preserve the property and assets that fall within the scope of the administration.⁴³ His failure to use due diligence to sell perishable property until it is lost to the estate,⁴⁴ or to take proper security for the price of property sold, falls within this rule.⁴⁵ Payment of legacies before the debts are satisfied, or payment of debts out of their order,⁴⁶ or the negligent payment of debts not due and owing, are common examples of devastavit, for which the principal and his sureties are liable.⁴⁷

§ 324. Same—Failure to Pay Claims, Legacies or Distributive Shares. It has been held in England under the Statute, 22 Car. 2, that failure to pay claims

40. *State v. Scott*, 12 Ind. 529; *Booth v. Patrick*, 8 Conn. 106; *Judge of Probate v. Lane*, 6 N. H. 55.

41. *Smith v. National Bank*, 101 U. S. 320-327; *Dawes, etc. v. Boylston*, 9 Mass. 337-352; *Martha Jane Camp v. Smith, Exr. etc.*, 68 N. Car. 536; *Lacoste v. Splivalo*, 64 Cal. 35.

42. *Butler v. Sisson*, 49 Conn. 580; *Probate Court v. Carr*, 20 R. I. 592; *Lyon v. Osgood*, 58 Vt. 707; *State v. Wilmer*, 65 Md. 178; *Keowne v. Love*, 65 Tex. 152; *Gay v. Grant*, 105 N. Car. 478; *State v. Ruggles*, 23 Mo. 339. As to debts due from the executor or administrator, see *Ante*, sec. 318.

43. *Appeal of Baer*, 127 Pa. 360; *Mills' Adm'r v. Talley's Adm'r*, 83 Va. 361, 791; *Adkins v. Hutchings*, 79 Ga. 260.

44. *State v. Scott*, 12 Ind. 529.

45. See *White v. Moe*, 19 Oh. St. 37.

46. *State v. Taylor*, 100 Mo. App. 481; *State v. Brown*, 30 Ind. 425.

47. *Worthy v. Brower*, 93 N. Car. 344.

against the estate is not a breach of the bond rendering the sureties liable.⁴⁸ In this country the contrary seems to be well settled where there are assets and the claims have been legally established.⁴⁹

After the debts and the expenses of administration have been paid, it is a breach of the bond for the executor to refuse or neglect to pay legacies out of property or moneys in his hands, and his failure to do so will ordinarily be a breach of his bond.⁵⁰ Failure to pay out of moneys in hand legacies charged upon land is not a breach.⁵¹ Failure of an administrator to pay distributive shares after the amount thereof and the persons entitled thereto are ascertained, and a valid decree of distribution has been made, is clearly a breach of his bond, but not before,⁵² though failure on the part of the administrator to apply for an order of distribution within a reasonable time has been held a breach.⁵³

§ 325. Failure to Account. Failure of an executor or administrator to render an account within the time limited by law or the condition of his bond is a breach for which the sureties are liable⁵⁴ in nominal damages at

48. *Canterbury v. Wills*, 1 Salk. 315. See *People v. Dunlap*, 13 Johns. (N. Y.) 437.

49. *People v. Dunlap*, supra; *Clark v. Mix*, 15 Conn. 152; *Warren v. Powers*, 5 Conn. 373; *Washington v. Hunt*, 12 N. Car. 475; *Grimmet v. Henderson*, 66 Ala. 521; *Pence v. Makepeace*, 75 Ind. 480; *Cannon v. Cooper*, 39 Miss. 784, 80 Am. D. 101; *Johanson v. Hoff*, 70 Minn. 140.

50. *Perkins v. Moore*, 16 Ala. 9; *Gould v. Steyer*, 75 Ind. 50; *Kreamer v. Kreamer*, 52 Kan. 597; *State v. Wilson*, 38 Md. 338; *Conant v. Stratton*, 107 Mass. 474; *Probate Judge v. Emery*, 6 N. H. 141. See *Fulcher v. Com.*, 3 J. J. Marsh (Ky.) 592.

51. *Gookin v. True*, 3 N. H. 288. Compare *Thornton v. Fitzhugh*, 4 Leigh (Va.), 209.

52. *Mackey v. Coxe*, 18 How. (U. S.) 100; *Probate Court v. Kimball*, 42 Vt. 320; *Choate v. Jacobs*, 136 Mass. 297; *Jones v. Irvine*, 23 Miss. 36. Failure to pay allowances to the widow is a breach of the bond. *Choate v. Jacobs*, supra.

53. *Choate v. Jacobs*, supra.

54. *McKim v. Harwood*, 129 Mass. 75; *Johannes v. Youngs*, 45 Wis. 445; *Clarke v. Clay*, 31 N. H. 393; *Bratton v. Davidson*, 79 N. Car. 423.

least;⁵⁵ though it is held in a number of states that there is no breach until the executor or administrator has been duly cited to settle his accounts and has neglected or refused to do so.⁵⁶

§ 326. Special Bond Upon Sale of Real Estate—Liability of Special and General Bond. Without going into the origin and history of the jurisdiction, and laying aside such powers as may have been conferred by will, it must suffice for present purposes to say that power to authorize the executor or administrator to sell real estate of decedents, when necessary for payment of debts and expenses of administration, is usually vested by statute in the probate courts, and in many states a sale may be authorized for the payment of legacies where the personalty is deficient, and often under other circumstances. A sale of realty, however, cannot be validly ordered for a purpose not authorized by statute.⁵⁷ These statutes quite generally require the taking of a special bond for the proper application of the proceeds, and in some jurisdictions the failure to give such bond avoids the sale.⁵⁸ It is held in nearly all states that the sureties on the general bond are liable equally with the sureties on the special bond for the proceeds of the sale, the special or sale bond being merely cumulative or additional security for their proper application.⁵⁹

§ 327. Additional, Successive and Substituted Bonds—Contribution. Usually courts of probate have power to

55. *Clark v. Cress*, 20 Ia. 50.

56. *Gilbert v. Duncan*, 65 Me. 469; *Probate Judge v. Couch*, 59 N. H. 39; *Probate Court v. Eddy*, 8 R. I. 339; *Probate Court v. Carr*, 20 R. I. (Pt. III) 196.

57. See *Petit v. Petit*, 32 Ala. 288.

58. *Clay v. Field*, 115 U. S. 260; *Babcock v. Cobb*, 11 Minn. 347; *Currie v. Stewart*, 26 Miss. 646, 27 Miss. 52, 61 Am. D. 500. Contra, *Wynan v. Campbell*, 6 Port. (Ala.) 219, 31 Am. D. 677. See also, *Foster v. Birch*, 14 Ind. 445; *Frothingham v. Petty*, 197 Ill. 418; *Jones v. French*, 92 Ind. 138; *Norman v. Olney*, 64 Mich. 533.

59. *Durfee v. Joslyn*, 92 Mich. 211; *Kehnast v. Dawm*, 4 Oh. N. P. 366, 6 Oh. Dec. 401. Contra, in Massachusetts, it seems, under the terms of the general bond. *Robinson v. Millard*, 133 Mass. 236.

require additional bonds from executors or administrators, wherever it appears that the security given is inadequate.⁶⁰ Where further security in the form of a new and additional bond is required and given in the course of administration, the sureties on both the new and the old bond are liable, ordinarily, for all defaults occurring during the entire administration, whether before or after the new bond was given. But while the new bond relates back to the grant of administration, and the sureties on the old and new bonds are regarded as parties to a common undertaking so far as the obligees are concerned,⁶¹ the sureties on the first bond are bound to indemnify the sureties on the second against liability for defaults occurring before the second bond was given,⁶² though for defaults occurring afterward they are liable among themselves for contribution in proportion to the penalties of their respective bonds.⁶³ But the precise effect of a new or additional bond must depend upon its terms, the terms of the statute under which it was given, and the circumstances under which it was required.

Where the statute provides that the giving of the new bond shall discharge the sureties on the old bond for subsequent defaults, the new bond was held cumulative and the sureties on the new as well as the old bond were bound for prior defaults.⁶⁴

Where a new bond is taken as a substitute for a prior one, however, the sureties on the latter are not

60. See *Schouler Ex's & Admrs.*, sec. 148, and statutes in the several states.

61. *Schouler, Exrs. & Admrs.*, sec. 48; *Brown v. State*, 23 Kan. 164; *Lacoste v. Splivalo*, 64 Cal. 35; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *State v. Berning*, 6 Mo. App. 195; *Pinkstaff v. The People*, 59 Ill. 148.

62. *Lingle v. Cook*, *supra*; *Corrigan v. Foster*, 51 Oh. St. 225. Compare *Rudolf v. Malone*, 104 Wis. 470; *Thompson v. Dekum*, 32 Ore. 506.

63. *Enicks v. Powell*, 2 Strobb. Eq. (S. C.) 196; *Loring v. Bacon*, 3 Cush. (Mass.) 465.

64. *Salyers v. Ross*, 15 Ind. 130; compare *Powell v. Powell*, 48 Cal. 234.

liable for subsequent defaults of the principal, provided the statute authorizes the taking of such new bond as a substitute for a prior one and the release of the sureties on the prior bond for subsequent defaults.⁶⁵ Statutes frequently provide that sureties on administration bonds may petition for counter security, and when the new bond is given, pursuant to such petition, it inures to the benefit of the petitioning sureties. Under many statutes, and perhaps without statutory authority, a surety apprehensive of default, may petition for his own release, whereupon the executor or administrator must execute a new bond or suffer removal;⁶⁶ and it has been held where a new bond is thus substituted that the sureties thereon are primarily liable for all defaults, prior and subsequent, though the sureties on the first bond, if the substituted bond be insufficient, may be held for all defaults prior to their release.⁶⁷

§ 328. Duration of Liability of Sureties for Executors or Administrators—Discharge of Surety—In General.

Some matters appropriate to this head have already been considered in treating of additional, successive and substitute bonds.⁶⁸ Generally, however, whatever discharges the principal from past or future liability, discharges the surety similarly.⁶⁹ The discharge of sureties for executors or administrators will be further considered under the following heads:

1. Death of principal or surety.
2. Settlement by and discharge of principal.

65. See *Richter v. Estate of Lieby*, 101 Wis. 455, and authorities cited and reviewed.

66. See *Frost, Guar. Ins.* (2d. Ed.) sec. 254; *Nat. Surety Co. v. Morris*, 111 Ga. 307, *Am. Surety Co. v. Thurber*, 162 N. Y. 244. Compare *Com. v. Rogers*, 53 Pa. St. 470.

67. *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Phillips v. Braziel*, 14 Ala. 746.

68. Ante, sec. 327.

69. *Austin v. Raiford*, 68 Ga. 201; *McBroom v. Governor*, 6 Port. (Ala.) 32; *People v. White*, 11 Ill. 341.

3. Revocation of letters—resignation or removal of principal.

4. Material alteration of the bond or giving time to the principal.

5. Expiration of term of office.

6. Giving new or special bond for legacy or distributive share.

7. Retention of property in a different capacity.

8. The statute of limitations.

§ 329. Death of Principal or Surety. The death of an executor or administrator does not relieve his sureties from liability for defaults committed during his lifetime, and they are liable likewise for the failure of the representatives of their deceased principal to account to the principal's successors in office for the assets of the estate.⁷⁰ The death of the surety has of itself no affect upon the liability of his estate for past or future defaults.⁷¹

§ 330. Removal or Resignation of Principal. The removal of the principal and revocation of his letters testamentary or of administration work a discharge of the surety for all his future acts involving the administration. They remain liable however until he has settled his account of the administration and paid over whatever is due from him upon such settlement and the court may proceed with such settlement, notwithstanding such revocation.⁷²

§ 331. Settlement by and Discharge of Principal—Effect of Adjudication Against Principal. An adjudication approving the account of an executor or administrator and discharging him finally, is in the nature of a judgment. It will therefore fully protect both the principal

70. *Williams v. State*, 68 Miss. 680, 24 Am. St. R. 297; *O'Gorman & Lindeke*, 26 Minn. 93. See *State v. Rottaken*, 34 Ark. 144.

71. *Hightower v. Moore*, 46 Ala. 387.

72. *Neville v. Woodburn*, 160 Ill. 203, 52 Am. St. R. 315. Compare *State v. Rottaken*, *supra*.

and sureties on his bond while it remains unvacated and unreversed, and is not open to collateral attack save for want of jurisdiction.⁷³

The action of the proper court in passing upon the final account of an executor or administrator is likewise in the nature of a final judgment, and is ordinarily conclusive against his sureties in the absence of fraud or collusion by the very terms of their undertaking, though they were not parties to the proceeding and had no opportunity to be heard.⁷⁴ The periodic or annual accounts of executors or administrators, however, are only *prima facie* evidence for or against them or their sureties.⁷⁵

§ 332. Alteration of Bond or Giving Time to Principal. Sureties upon the bond of an executor or administrator are released by its material alteration without their consent, at least as against those responsible for such alteration or privy thereto.⁷⁶ Any binding agreement between the principal and those interested in the estate by which the responsibilities of the principal are materially altered, will likewise discharge the sureties unless they consent.⁷⁷

73. *Tate v. Norton*, 94 U. S. 746, 750; *Tucker v. Stewart*, 147 Ia. 294, 300, 302, and cases cited. *Gumble v. Jordan*, 54 Ala. 432; *Trammel v. Phileo*, 33 Tex. 395.

74. *Ante*, sec. 254, and cases cited; *Tate v. Norton*, *supra*; *Treweek v. Howard*, 105 Cal. 434; *United Brethren v. Aiken*, 45 Ore. 247, 66 L. R. A. 654; *McDonald v. People*, 222 Ill. 325; *Judge of Probate v. Quimby*, 89 Me. 574; *Probate Judge v. Sulloway*, 68 N. H. 511, 49 L. R. A. 347, 73 Am. St. R. 619; *In re Young's Estate*, 199 Pa. 35; *Briggs v. Manning*, 80 Ark. 304; *Meyer v. Barth*, 97 Wis. 352, 65 Am. St. R. 124. That the adjudication is only *prima facie* evidence against the sureties, see *Bird v. Mitchell*, 101 Ga. 46; *Wyemann v. Mainegra*, 105 La. 305. See, also, *Robinson v. Hodge*, 117 Mass. 222, 224; *Gookin v. Sanborn*, 3 N. H. 491.

75. *Picot v. Biddles Exr.*, 35 Mo. 29, 86 Am. D. 134, 143 and note. See *Blake v. Pegram*, 101 Mass. 592.

76. A material alteration by the probate judge with the consent of the principal has been held to release the nonconsenting sureties. *Howe v. Peabody*, 2 Gray (Mass.), 556.

77. *Pyke v. Searcy*, 4 Port. (Ala.) 52; *Collier v. Leonard*, 59 Ga. 497; *Rutter v. Hall*, 31 Ill. App. 647; *Herbert v. Herbert*, 22 La. Ann. 2; *Forbes & Allen*, 166 Mass. 569; *Ward v. Tinkham*, 65 Mich. 695.

A binding agreement between the principal and those interested in the estate by which they extend the time within which the principal may do an act beyond that fixed by the bond or by law, will release the sureties, at least with respect to such act, unless they consent.⁷⁸

§ 333. Retention of Property in Different Capacity. If property is lawfully transferred from the executor or administrator as such, to himself in a different capacity, as for example as guardian or trustee, the liability of his sureties as personal representative is at an end.⁷⁹ Under this rule however a personal representative cannot by such a mere paper transfer as charging himself as guardian or trustee, and crediting himself as guardian, relieve his bondsmen in the former capacity and charge his sureties in the latter, for property previously wasted, lost or misapplied.⁸⁰

§ 334. Giving New Bond or Special Bond for Distributive Share. The effect of additional, substituted or successive bonds has already been discussed. The giving of a special bond to a distributee, for the amount of his share, under agreement with him, has been held a discharge of the general bond pro tanto.⁸¹

§ 335. Statute of Limitations. The ordinary statutes of nonclaim have no application to suits on administration bonds. Unless a special period of limitations is provided for such bonds, they are subject to the general provisions as to actions on sealed instruments. In many states the statute runs only from the date a final accounting or a decree or order of distribution, while in others it runs from the date of a devastavit. Details on this branch of the law should be sought in special works.

78. *Beckham v. Pride*, 6 Rich. Eq. (S. Car.) 78.

79. See post, sec. 341.

80. *Smith v. Gregory*, 26 Gratt. (Va.) 248; *Conkey v. Dickson*, 13 Met. (Mass.) 51.

81. *Corn v. Schryock*, 15 Serg. & R. (Pa.) 69; *Beckham v. Pride*, 6 Rich. Ed. (S. Car.) 78. In this last case the transaction clearly amounted to the giving of time to the principal.

CHAPTER XXXIII.

GUARDIANSHIP BONDS.

§ 336. **Nature and Necessity.** A guardian entrusted with the estate of his ward is quite generally required to give bonds with sureties for the faithful performance of his trust, and under the statutes in most states the appointment of a probate guardian confers no authority until such bond is given and approved by the court.¹

As a natural guardian as such exercises parental authority merely, no bond is required of him.² Neither are bonds required of testamentary guardians in the absence of statute, at least where the instrument of appointment expressly dispenses with them, though under the laws of most states the court may require bonds of a testamentary guardian in its discretion.³

Courts of equity have undoubted power to require bonds of guardians appointed by them and statutes often prescribe their practice in this respect.

As the guardian's bond under modern practice is commonly taken in the probate court and runs to the judge of probate, it is often called a probate bond.⁴

§ 337. **Amount, Form and Requisites of the Bond.** The form of the bond, particularly in the case of probate guardians, is usually prescribed by statute. Generally

1. *Holden v. Curry*, 85 Wis. 504; *State v. Sloane*, 20 Ohio, 327; *Hatch v. Ferguson*, 57 Fed. 966, 68 Fed. 43; But see *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. D. 41; *Fay v. Hurd*, 8 Pick. (Mass.) 528; *Hunt v. Insle*, 56 Kan. 213; *Cuyler v. Wayne*, 64 Ga. 78, *In re Chin Mee Ho*, 140 Cal. 263. Laws authorizing trust companies to act as guardians commonly dispense with the bond, as their capital and the securities deposited by them with the state are sufficient protection to the ward. *Matter of Cordova*, 4 Redf. (N. Y.) 66.

2. *Westbrook v. Comstock*, Walk. (Mich.) 314.

3. See *Murfrees on Official Bonds*, secs. 350, 357.

4. *Thomas v. White*, 12 Mass. 367.

it is in double the amount of the personal estate including the income of the realty during the period of minority, with sureties to be approved by the court, conditioned, ordinarily, as follows:

1. To make a true inventory of the estate of the ward and return the same into the court.

2. To collect, preserve, dispose of and manage such estate according to law for the best interests of the ward, and also to discharge such duties as to the care, custody, maintenance and education of the ward as the character of the ward and the nature and scope of the guardianship may require.

3. To render accounts of his stewardship, at the times (usually once a year) and in the manner prescribed by law.

4. To finally account to and settle his trust with the court, or with the ward if he be of age and competent, and to pay or deliver over to the ward or other person entitled, all money and property of the ward in his hands by virtue of the guardianship.

Though a bond in some respects irregular and insufficient as a statutory or probate bond, it may, particularly if it has been acted upon, be valid as a common law obligation, both against the guardian and his sureties,⁵ and substantial compliance with the requirements of the statute is all that is necessary to give it the character of a statutory bond.⁶

Where a bond has been given and the guardian has acted as such in receiving the property of the ward, both he and his sureties are estopped to show the invalidity of the appointment, even though it involves the jurisdiction of the court.⁷

5. *Matthews v. Mauldin*, 142 Ala. 434; *State v. Britton*, 115 Ind. 55; *Pratt v. Wright*, 13 Gratt. (Va.) 175, 67 Am. D. 767. See, also, *McFadden v. Hewitt*, 78 Me. 24; *Painter v. Mauldin*, 119 Ala. 88, 72 Am. St. R. 902.

6. See *Brunson v. Brooks*, 68 Ala. 248.

7. *Williamson v. Woodman*, 73 Me. 163; *Cotton's Admr. v. Wolf*, 14 Bush (Ky.), 238; *McClure v. Com.*, 80 Pa. 167; *Hazelton v. Douglas*,

§ 338. **What Covered by Bond.** The bond of a general guardian commonly covers all defaults or breaches of duty committed by him in that capacity but not otherwise. His sureties as general guardian are not liable as a rule for his defaults as special or sale guardian or for the proceeds of the sale coming to his hands as such. The remedy in such cases is upon the special or sale bond.⁸ Neither are the sureties liable for property or funds that come to the guardian's hands after his trust is terminated,⁹ nor for money or property received otherwise than as a guardian, or after final discharge.¹⁰ Property in the guardian's hands when the bond was given, however, is covered by it; but whether the sureties are liable, where the bond is not retrospective in its terms, for money or property previously received and wasted, converted or misapplied, is not uniformly decided.¹¹ But ordinarily debts owing by the guardian to the ward when the guardianship commenced are deemed assets in his hands, as against both him and his sureties, provided

97 Wis. 214, 65 Am. St. R. 122; *State ex rel. Ross v. McLaughlin*, 77 Ind. 335; and see *Hine v. Morse*, 218 U. S. 493, 510. Though the appointment be void, the estoppel nevertheless arises from the bond if it is valid as a common-law obligation. *Williamson v. Woodman*, *supra*; *Schlee v. Darrow*, 65 Mich. 362. Compare *Thomas v. Burrus*, 23 Miss. 550, 57 Am. D. 154, and cases cited.

8. *Com. v. Pray*, 125 Pa. 542; *Williams v. Morton*, 38 Me. 47, 61 Am. D. 229; *Judge of Probate v. Toothaker*, 83 Me. 195; *Smith v. Gummere*, 39 N. J. Eq. 27; *Kester v. Hill*, 42 W. Va. 611; *Madison Co. v. Johnston*, 51 Ia. 152. Contra, in a few states, it seems, as to proceeds of the sale actually received as general guardian, *State v. Hull*, 53 Miss. 626; *Tuttle v. Northrop*, 44 Ohio St. 178; *Hart v. Striebling*, 21 Fla. 136.

9. *People v. Seelye*, 146 Ill. 189; *Garrett v. Reese*, 99 Ga. 494; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608.

10. *Merrells v. Phelps*, 34 Conn. 109; *Naugle v. State*, 101 Ind. 284.

11. That the sureties are so liable, see *Douglass v. Kessler*, 57 Ia. 63; *Fogarty v. Ream*, 100 Ill. 366. Contra. *State v. Shackelford*, 56 Miss. 648; *Howe v. White*, 162 Ind. 74; *Holden v. Curry*, 85 Wis. 504; *Parker v. Medsker*, 80 Ind. 155.

he was solvent when the bond was given, or becomes so before the settlement of his trust.¹²

The bond of a general guardian covers property or assets actually received from a foreign state.¹³

Neither the guardian or his sureties are liable for losses not attributable to his wilful default or want of ordinary business care and prudence. If, therefore, the guardian deposits in bank the surplus funds of his ward not proper to be invested or awaiting prudent investment, using due care to select a safe and depository, neither he nor his sureties are liable for their loss through failure of the bank, provided he has deposited them in such a way as to indicate their trust character. If he deposits them in his own name, however, with nothing to ear-mark them as the funds of the ward, he and his bondsmen will be liable for their loss, regardless of his diligence or want of it.¹⁴

Not only are the sureties on a guardian's bond bound for what their principal actually received and wasted or misapplied, but they are liable as well for what he should have received but failed to obtain through his fraud or negligence.¹⁵

§ 339. Additional and Substituted Bonds. Where additional bonds are required and given, the sureties on the original bond remain liable both for past and future de-

12. *Sargent v. Wallis*, 67 Tex. 483; *Johnson v. Hicks*, 97 Ky. 116. Some cases hold that such debts are assets even though the guardian was insolvent, and remained so down to the termination of his trust. In fact practically the same conflict in the authorities will be found here as in the case of debts due from insolvent executors and administrators. See ante, 318.

13. *Collins v. Slaughter*, 1 Ky. L. Rep. 261; *State v. Hull*, 53 Miss. 626; *Pearson v. Daley*, 7 Lea (Tenn.), 674.

14. See Ante, sec. 323, for the analogous rule as to executors and administrators; see in re *Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252; *Fidelity & Dep. Co. v. Butler*, 130 Ga. 225, 18 L. R. A. (N. S.) 994, as to the rule of the text and also to the effect that if the guardian, by agreement, permits the surety to control the deposit, both he and his surety are absolutely liable for the loss.

15. *Culp v. Stanford*, 112 N. Car. 664; *Brooks v. Tobin*, 135 Mass. 69; see, also, *Loftin v. Cobb*, 126 N. Car. 58.

faults.¹⁶ The sureties on the new bond, however, are liable with the sureties on the old one for all future defaults.¹⁷ These may consist in misapplying or wasting funds or property on hand when the new bond was given, as well as what was afterward received.¹⁸ Where a new bond is substituted for the old one however, the sureties on the latter are bound for past, but not for subsequent defaults.¹⁹ But whether the sureties on the new and substituted bond are liable for prior defaults is not uniformly determined. In most states, however, they are liable for all defaults during any period of the guardianship, on the ground that the condition of the bond is that the guardian shall finally and truly account for the execution of his trust and turn over the property remaining in his hands upon such settlement,²⁰ and when they are so liable, the right of contribution exists between the sureties on both bonds.²¹

§ 340. Same—One Guardian for Several Wards or Several Guardians for Same Ward. A guardian for several wards may usually give one bond for all. In such cases his

16. *Hutchcraft v. Shrout*, 1 T. B. Monr. (Ky.) 206; *Forbes v. Harrington*, 171 Mass. 386 and cases cited; *Jones v. Blanton*, 6 Ired. Eq. 115, 51 Am. D. 415.

17. *Loring v. Bacon*, 3 Cush. (Mass.) 465; *State v. Fields*, 53 Mo. 474.

18. *Clark v. Wilkinson*, 59 Wis. 543; *Parker v. Medsker*, 80 Ind. 155; *State v. Dennis*, 58 Mo. App. 568.

19. *Spencer v. Houghton*, 68 Cal. 82; *Bell v. Rudolph*, 70 Miss. 234; *State v. Drury*, 36 Mo. 281; *Foye v. Bell*, 18 N. Car. (1 Dev. & B.) 275. In order to release the sureties on the old bond for subsequent defaults, however, the discharge of such bond must be in the manner prescribed by law. *Rice v. Wilson*, 129 Mich. 520; *Brehm v. U. S. Fid. & Guar. Co.*, 124 Wis. 339.

20. *Brehm v. U. S. Fid. & Guar. Co.*, 124 Wis. 339; *Bell v. Jasper*, 37 N. Car. 597; *Loring v. Bacon*, 3 Cush. (Mass.) 465; *Jones v. Hays*, 38 N. Car. 502, 44 Am. D. 78; *Merrills v. Phelps*, 34 Conn. 109; *Kaspar v. People*, 230 Ill. 342; *Com. v. Cox*, 36 Pa. 442; *Knox v. Kearns*, 73 Ia. 286; *Sayers v. Cassell*, 23 Gratt. (Va.) 525; *Abshire v. Raive*, 112 Ky. 545; 99 Am. R. 302 and cases cited. But see, *Parker v. Medsker*, 80 Ind. 155; *State v. Shackelford*, 56 Miss. 648; *McWilliams v. Northfleet*, 60 Miss. 987.

21. See *Fidelity & Deposit Co. v. Phillips*, 235 Pa. St. 469.

sureties are liable as if a separate bond were given to each ward, except that each can enforce only his proportionate amount of the penalty, unless the other wards are made parties to the suit and it appears that they would not be prejudiced by greater than a proportionate recovery.²²

Joint guardians are not usually bound for the defaults of their fellows; and though they execute a bond together, they are not liable as sureties for one another, but each is bound solely for his own defaults, save where they both participated in the wrong, or one of them was negligent in not preventing default by the other.²³ The sureties on the bond of joint guardians, however, are liable for the defaults of any or all of the guardians.²⁴

§ 341. When guardian and his Sureties as Such Chargeable—Same Person Guardian and Personal Representative. Sometimes the same person is appointed both guardian and personal representative. Such person cannot be sued in both capacities, nor can his sureties in one capacity be held for his defaults in the other. He is chargeable primarily as executor or administrator, and he continues so until, in fact or in contemplation of the law, the assets to which the ward is entitled have been carried over from his account as personal representative to his account as guardian. The transfer will ordinarily be shown by his accounts rendered in court. In other cases slight evidence will be held to show a transfer, as the division of the estate among other legatees or distributees, placing chattels on the wards land, and the like.²⁵

22. *Winslow v. People*, 117 Ill. 152; *Walsh v. State*, 53 Md. 539; *Bescher v. State*, 63 Ind. 302.

23. *Nanz v. Oakley*, 120 N. Y. 84; *Hurlbut v. State*, 71 Ind. 154, *Contra*, *Williams v. Harrison*, 19 Ala. 277; *Freeman v. Brewster*, 93 Ga. 648; See *Pim v. Downing*, 11 S. & R. (Pa.) 66.

24. *People v. Byron*, 3 Johns. Cas. (N. Y.) 53; *Hocker v. Woods*, 33 Pa. St. 466; *Nanz v. Oakley*, *supra*.

25. *Broadus v. Rosson*, 3 Leigh (Va.) 12; *Johnson v. Johnson*, 2 Hill Ch. (S. Car.) 277, 29 Am. D. 72; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174. But see *Conkey v. Dickinson*, 13 Met. (Mass.) 51.

Indeed it is held in several states that the transfer will be legally regarded as having taken place, and the guardian chargeable as such, and his sureties as guardian liable, from the time when it was his duty to settle his accounts as executor or administrator and hold the property as guardian.²⁶

§ 342. Adjudication Against Guardian Conclusive Against Sureties. When the guardian's accounts have been finally settled in court and an order is made against him for the balance found due, the sureties on his bond are concluded in most states, at least in the absence of fraud or collusion, though they were not made parties to the proceeding and had no notice thereof and did not appear. This is upon the theory already explained that they are privy to the proceedings against their principal by the very terms of their contract.²⁷ In a few states, however, the adjudication upon a final account of the guardian is only *prima facie* evidence of the fact and extent of liability as against the sureties, unless they are notified of the proceedings or appear therein.²⁸ The adjudication upon a final accounting is as conclusive in favor of the guardian and his sureties as it is against them,²⁹ unless it was tainted with fraud.³⁰

26. *Stanley's App.*, 8 Pa. St. 431, 49 Am. D. 530; *In re McIntosh*, 158 Pa. St. 525; *Watkins v. State*, 2 Gill. & J. (Md.) 220; *Adams v. Gleaves*, 10 Lea (Tenn.) 367. See, however, *Burton v. Anderson*, 5 Harr. (Del.) 221.

27. See ante, sec. 254; *Hailey v. Boyd*, 64 Ala. 399; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. R. 435; *McCleary v. Menke*, 109 Ill. 294; *Sillette v. Wiley*, 126 Ill. 310, 9 Am. St. R. 587; *Knepper v. Glenn*, 73 Ia. 730; *Kattelman v. Guthrie's Est.*, 142 Ill. 357; *State v. Slaughter*, 80 Ind. 597; *Jacobson v. Anderson*, 72 Minn. 426; *Rice v. Wilson*, 129 Mich. 520; *Chase v. Wright*, 116 Ia. 555; *Shepard v. Pebbles*, 38 Wis. 373; *Holden v. Curry* 85 Wis. 504; *Braiden v. Mercer*, 44 Oh. St. 339; *Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. R. 641.

28. *Fidelity & Dep. Co. v. Rich*, 122 Ga. 506; *Parr v. State*, 71 Md. 220; *Moore v. Alexander*, 96 N. Car. 34; *State v. Hull*, 53 Miss. 626. See *Shepard v. Pebbles*, supra, and cases cited at page 379 of the opinion.

29. *Mitchell v. Williams*, 27 Mo. 399; *In re Dean*, 38 N. J. Eq. 201.

30. *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. R. 435; *Parr v.*

The surety on a guardian's bond, however, is not concluded by an adjudication against his principal from litigating the fact of suretyship or the existence of his liability at the time the principal's default occurred.³¹

§ 343. Settlement With Ward out of Court. In the absence of statutes the guardian has a right to settle with his ward out of court. Such settlement is open to the presumption of fraud and undue influence, however, unless the technical relation of guardian and ward has been so long terminated that the parties may be deemed to meet on a footing of equality, and the burden of proving fairness is upon the guardian.³² But in spite of this fact it seems that in an action against the sureties on the guardian's bond the burden of proving fraud or undue influence is upon the ward, on the ground that the surety, being a stranger to the transaction, is not in position to prove the good faith of the settlement.³³ If such settlement is fraudulent in fact, however, the sureties are liable, but otherwise they are exonerated.³⁴

§ 344. Suits Upon Guardian's Bonds—Damages—Defenses. Generally no action lies upon a guardian's bond until an accounting has been had in the probate court and a balance has been found due thereon, or unless the guardian has refused to account therein when duly cited, for the guardian and his trust and the propriety of his charges and expenditures are peculiarly within the jurisdiction of that court.³⁵

State, 71 Md. 220; *Carter v. Tice*, 120 Ill. 277; *Baum v. Hartman*, 226 Ill. 160.

31. *Gravett v. Malone*, 54 Ala. 19.

32. See *Spencer's Domestic Relations*, Sec. 769; *Pomeroy's Eq. Jur.*, Sec. 961.

33. *People v. Seelye*, 146 Ill. 189.

34. *Parr v. State*, 71 Md. 220; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. R. 435; *Carter v. Tice*, 120 Ill. 277; *People v. Seelye*, supra; *Smith v. McKee*, 67 Ia. 161; *Davenport v. Olmstead*, 43 Conn. 67; *Hart v. Stribling*, 21 Fla. 136.

35. See *Spencer, Dom. Rel.*, sec. 764; *Ordinary v. Heishon*, 42 N. J. Law, 15; *Tudhope v. Potts*, 91 Mich. 490; *Cobb v. Kempton*,

It has been held in some states, however, that an action will lie upon the bond without such accounting and that the fact and extent of the guardian's default may be determined in the suit upon the bond.³⁶

The damages on a guardian's bond can never exceed its penalty.³⁷ Subject to this limitation they are measured, of course, by the amount found due to the ward or his representatives upon the accounting in the probate court, or in the action on the bond in states where the amount of the guardian's liability may be determined in the suit upon the bond.

As to when the statute of limitations begins to run against the sureties on a guardian's bond, the decisions are not harmonious, even under statutes similar or identical in their terms. Furthermore, special provisions and limitations for the protection of sureties on guardianship bonds are quite common so that no adequate presentation of the law of that subject can be made here.

154 Mass. 266 and cases cited. Compare *Farrington v. Secor*, 91 Ia. 606. See *Perkins v. Stimnel*, 114 N. Y. 359, 11 Am. St. R. 659. No accounting is necessary where the amount of the guardian's default can be definitely determined without it, or where the default covers the entire fund, or there is only one item in the account. *Long v. Long*, 142 N. Y. 545; *Stage v. Hammond*, 27 Gratt. (Va.) 651. See *Davenport v. Olmstead*, 43 Conn. 67.

36. See *Davenport v. Olmstead*, supra; *Ragland v. Justices*, 10 Ga. 65; *McIntyre v. People*, 103 Ill. 142 (under statutes); *English v. State*, 81 Ind. 455; *State v. Stevin*, 93 Mo. 253, 3 Am. St. R. 526; *Justices v. Willis*, 3 Yerg. (Tenn.) 461.

37. *Anthony v. Estes*, 101 N. Car. 541.

TABLE OF CASES.

References are to Pages.

Abbey v. Van Campen.....	170, 183	Alexander v. Ghislin	107
Abbott v. Nash	100	Alexander v. Jacoby	389
Abeel v. Radcliff	109	Alford v. Baxter	222- 339
Abel v. Alexander	325	Alford v. Irvine	419
Abercrombie v. Knox	248	Alger v. Alger	153
Abshire v. Raive	444	Alger v. Scoville	99
Acers v. Curtis ....215, 216,	218	Allan v. Kenning	134
Ackley v. Parmenter ...103,	104	Alleghany Valley R. R. Co. v. Dickey	163, 165, 192
Acme Mfg. Co. v. Reed	55	Allen v. Bennett	112
Adair v. Campbell	421	Allen v. Berryhill	30
Adams v. Drake	195	Allen v. Brown	409
Adams v. Flanagan	212	Allen v. Bruton	430
Adams v. Gleaves	446	Allen v. Culver	266
Adams v. Jones	48	Allen v. Enroth	309
Adams v. McMillan	109	Allen v. Fairbanks	20
Adams v. Savery House Hotel Co.	384	Allen v. Herman	138
Adams v. Whitcomb	423	Allen v. Hopkins	284
Adkins v. Hutchings	432	Allen v. Jones	265
Adkinson v. Barfield	99	Allen v. Kellam ....397, 398	
Adler v. State	417, 420	Allen v. Leavens	106
Aetna Indemnity Co. v. Farm- ers Nat. Bank	72	Allen v. Marney	60
Aetna Indemnity Co. v. Schroe- der	71	Allen v. O'Donald	16
Aetna Ins. Co. v. Fowler.....	290	Allen v. Pike	49, 53
Aetna Ins. Co. v. Mabbett....	70	Allen v. Powell	189
Aetna Life Ins. Co. v. Middle- port	186	Allen v. Pryor	86
Afterdinger v. Ford	388	Allen v. Rightmere	255
Agee v. Steele	320, 326	Allen v. Rundle	144
Agnew v. Bell	201	Allen v. Sharpe's Rifle Co....	320
Agnew v. Merritt	331	Allen v. Wood	200, 233
Ahern v. Freeman	179	Allen v. Woodworth	248
Aiken v. Barkley	211	Alley v. Hopkins	311, 328
Ainslie v. Wilson	172	Allison v. McDonald	332
Aitken v. Lang	281	Allison v. Rutledge	112
Albany v. Andrews	253	Allison v. Sutterline ....184, 188	
Albro v. Robinson	160	Allnutts v. Ashenden	121
Alcorn v. Com.	241	Allport v. Kelly	410
Alderman v. Roesel	392	Allshouse v. Ramsay	117
Aldous v. Hicks	332	Alvord v. U. S.	382
Aldrich v. Aldrich ....215-	227	American Co. v. Wolfe	103
Aldrich v. Ames	100	Amherst Bank v. Root	360
Aldrich v. Carpenter	103	American Bank v. Baker	319
Aldrich v. Hapgood	232	Am. Bonding Co. v. Blount...	366
Aldrichs v. Higgins	136	Am. Bonding Co. v. Barke. .73,	75
Alexander v. Bank	351	Am. Nat. Bank v. Fidelity, etc. Co.	198
Alexander v. Bouton	17	Am. Bonding Co. v. Fist Nat. Bank	187
Alexander v. Byrd	352	Am. Bonding Co. v. Morrow..	293

References are to Pages.

Am. Bonding Co. v. National, etc. Bank	176-179	Apgar v. Hiler	3, 101, 208, 219, 160, 169
Am. Bonding & Trust Co. v. Burke	13-67	Apperson v. Wilbourn	237
Am. Bonding & Trust Co. v. Milwaukee Harvester Co....	126	Appleton v. Bascomb	156, 159
Am. Bonding & Trust Co. v. Ry. Co.	153	Appleton v. Parker	336
Am. Bridge Co. v. Colonial Tr. Co.	137	Arbogast v. Hayes	162
Am. Building & Loan Assn. v. Waleen	285	Archer v. Noble	368
Am. Casualty Co. v. Green....	305	Ardesco Co. v. North Ameri- can Co.	245
Am. Credit Indemnity Co. v. Athens Woolen Mills.....	127	Arents v. Com.	152
Am. Credit Indemnity Co. v. Carrolton Furnitue Co.....	72, 127, 263	Armistead v. Ward	330, 331
Am. etc. Co. v. Schultz.....	91	Armitage v. Baldwin	188
Am. Surety Co. v. Pauly.....	71, 74, 76, 124, 260, 261, 262	Armitage v. Pulver	205, 216
Am. Sur. Co. v. San Antonio L. & Tr. Co.	309	Armour v. Ins. Co.	73
Am. Surety Co. v. Shallenber- ger	38	Arms v. Beitman	315
Am. Surety Co. v. Thurber..	13, 140, 436	Armstrong v. Harshman	211
Ames v. Brown	296	Armstrong v. Walkup	442
Ames v. Foster	93, 95, 98, 99	Armstrong v. Warner	272
Ames v. Huse	182	Arnold v. Green	185
Ames v. Jackson	166	Arnold v. Hicks	198
Ames v. Maclay	355	Arnold v. Stedman	98, 100
Amicable Mut. Life Ins. Co. v. Sedgwick	305	Arthur v. Ingels	393
Analine, etc. Chemical Co. v. Am. Credit Indemnity Co..	127	Arthur v. Sherman	63
Anderson v. Bellenger	22, 296	Asbury v. Fleisher.....	161
Anderson v. Falconer	407	Ascherson v. Tredegar Dry Dock & Wharf Co....	246, 250
Anderson v. Harold	110	Ashbee v. Piddock.....	340
Anderson v. Jockett	363	Ashby v. Ashby	225
Anderson v. Jones	105	Ashby v. Smith	351
Anderson v. Mannon	330	Ashby's Adm'r v. Smith's Ex'r	348
Anderson v. McGowan	431	Asher v. Cabell.....	370
Anderson v. Meeker County..	396	Ashford v. Robinson....	113, 147
Anderson v. Nat. Surety Co..	41	Ashley v. Brazil.....	399
Anaheim v. Parker	69, 70	Aspinewall v. Sacchi.....	20
Anderson v. Pearson	219	Athol Machine Co. v. Fuller	31
Anderson v. Spence	100	Atlantic & Pacific Tel. Co. v. Barnes	70, 71
Anderson v. Thompson	362	Atlas Bank v. Brownell....	69, 70
Andrews v. Lawrence ...	301, 307	Atkins v. Bailey	357, 377
Andrews v. Marrett	315, 335	Atkins v. Payne	352
Andrews v. Planters' Bank..	40	Atkins v. Tredgold	287
Angrove v. Tippet	164	Atkinson v. Smith	405
Annett v. Terry	356	Atkinson v. Thayer	159
Annick v. Woodworth	179	Attorney-Genl. v. McClaugh- rey	362
Ansklund v. Aetna Indemnity Co.	309	Atwood v. Crowdie	136
Anstey v. Marden	91	Atwood v. Vincent	180, 192
Anthony v. Estes	448	Auchampaugh v. Schmidt, 165,	354
Anthony v. Fritz	314	Auditor v. Woodruff.....	364
		Auerbach v. Rogin.....	171
		Aultman v. Fletcher	92
		Aultman v. Hefner	272
		Aultman v. Smith	248
		Austin v. Darwin	330, 341
		Austin v. Raiford	436
		Averill v. Hedge.....	54
		Avery v. Rowell.....	40
		Ayer v. Getty.....	360
		Ayers v. Burns.....	163
		Ayler v. Murray.....	323

References are to Pages.

Ayres v. Harness	63	Bank v. Klingensmith	354
Babb v. Oakley	415	Bank of Monroe v. Gifford...	409
Babbitt v. Finn	402	Bank v. Muddgett	40
Babcock v. Bryant	257, 258	Bank v. Nordstrom	300
Babcock v. Carter	359	Bank v. Opera House Co....	192
Babcock v. Cobb	434	Bank v. Peltz	269, 270
Babcock v. Hubbard	160	Bank v. Rich	251
Babcock, In re	319	Bank v. Sinclair	49
Bachelder v. Fiske	221, 225, 232	Bank v. Small	256
Backhouse v. Hall	277	Bank v. Woodward	330
Backus v. Coyne	168, 218	Bank of Taylorsville v. Hard-	
Bacon v. Chesney	119	esty	270
Badeley v. Consolidated Bank	160	Bank v. Tumbler Co.	290
Badgley v. Moulton	25	Bank of Albion v. Burns ..	16, 17
Badlam v. Tucker	391, 392	Bank of Auburn v. Throop..	179
Baggott v. Mullen	207, 208	Bank of Brighton v. Smith..	361
Bagley v. Sasser	104	Bank of Columbia v. Jeffs..	336
Bailey v. Adams	328	Bank of Limestone v. Pen-	
Bailey v. Butterfield	378	nick	300, 301
Bailey v. Freeman	22	Bank of Missouri v. Matson...	348
Bailey v. Glover	288	Bank of Monroe v. Anderson	
Bailey Loan Co. v. Seward...	7	Bros.	67, 68, 69
Bailey v. Marshall	98, 100	Bank of Newbury v. Sinclair	255
Bailey's Est	158	Bank of New Zealand v. Simp-	
Bainbridge v. Wade	23	son	123
Baily v. Brownfield	192	Bank of Phillipi v. Kittle, 344,	
Baird v. Rice	351, 352	.....	349
Baker v. Briggs	268, 344, 352	Bank of Tarboro v. Fidelity	
Baker v. Davis	351	& Dep. Co.. 13, 38, 124, 261,	293
Baker v. Dening	111	Bank of Tasmania v. Jones.	337
Baker v. Kellogg	243	Bank of Washington v. Cred-	
Baker v. Kennett	29	itors	405
Baker v. Marshall	240, 351	Bankhead v. Hubbard....	424, 425
Baker v. Merriam	355	Banks v. Pike	271, 273
Baker v. Morgan	369	Banks & Walker v. McDowel	397
Baker v. Preston	377	Barber v. Bell	146
Baker v. Rand	136	Barber v. Gibson	226
Baldwin v. Hires	88	Barber v. Gillson	14, 172
Baldwin v. Emery	173	Barbour v. Robertson	427
Baldwin Coal Co. v. Davis, 103,	104	Bardwell v. Lydall	132
Ball v. Chancellor	406	Barclay v. Gooch	170, 171
Ballantine & Sons v. Fenn..	357	Barclay v. Lucas	277, 284
Ballard v. Burton	6-23- 26	Bard v. McElroy	146
Ball Electric Light Co. v.		Barden v. Southerland	63
Child	20	Bardwell v. Lydall	267
Ballew v. Roler	197, 198	Barge v. Van der Horck..	232
Balley v. Griffith	332	Barickman v. Kuykendall...	109
Ballock v. Peake	371	Barker v. Bucklin ..	102, 103, 113
Baltimore & Ohio R. R. Co. v.		Baker v. Kelly	255
Bitner	272, 273	Barker v. Prentiss	107
Baltzell v. Hall	427	Barker v. Scudder	97, 255
Bampton v. Paulin	99, 104	Barker v. Wheeler	356
Bangs v. Strong	320	Barlow v. Myers	149, 152
Bank v. Dickerson	302	Barman v. Carhartt	145
Bank v. Douglass	253	Barnes v. Boyer	15, 333
Bank v. Fordyce	351	Barnes v. Morris	198
Bank v. Hammond	255	Barnes v. Pearson	232
Bank v. Haskell	352	Barnes Cycle Co. v. Reed, 44	
Bank v. Jenkins	251	.....	48, 50
Bank v. Kercheval	2- 45	Barnett v. Lumber Co.....	106

References are to Pages.

Barnett v. Smith	276, 277	Beebe v. Dudley	49
Barney v. Clark	313, 35	Beers v. Haughton	419
Barney v. Grover	158, 182	Beers v. Strimple	120
Barns v. Barrow	121	Belden v. Hurlbut	59
Barrens v. McKenzie	410	Belding v. State	417
Barrett v. Bass	349	Belknap v. Bender	103
Barry v. Coombs	111, 112	Belknap v. Davis	419
Barry v. Law	110	Bell v. Boyd	218, 219
Barry v. Pullen	320	Bell v. Buren	121, 122, 123
Barry v. Ransom	101, 205, 219	Bell v. Colrain	372
Barry v. Screwmens Benevo-		Bell v. Jasper	216, 444
lent Assn.	377	Bell v. Kellar	30, 48
Barth v. Graf	161	Bell v. Lamkin	231
Bartlett v. McRae	195	Bell v. Mahin	297
Bascomb v. Smith	49	Bell v. Norwood	277
Bashford v. Shaw	146	Bell v. Pierce	414
Baskin v. Huntington	278	Bell v. Rudolph	444
Bassett v. Fidelity Co.	429	Bellinger v. Thompson	425, 424, 426
Bastow v. Bennett	134	Belloni v. Freeborn	131, 172
Batard v. Hawes	219, 225	Bellows v. Lovell	245
Batavian Bank v. McDonald..	327, 336	Bellows v. Sowles	89
Bates v. Branch Bank	8	Bem v. Shoemaker	401
Bateson v. Gosling	337, 341, 342	Bemiss v. Com.	403
Bath Gas Light Co. v. Claffy..	39	Benbaker v. Okerson	354
Batson v. King	100	Bennett v. Buchanan	171
Battle v. Hart	170, 183	Bennett v. Chandler	185
Bauchard Co. v. Fid. & Cas.		Bennett v. Dowling	168
Co.	306	Bennett v. Moore	86
Baucus v. Barr	429	Bensinger v. Wren	294
Baum v. Hartman	447	Benson v. Gibson	256
Bauschman v. Credit Guarant-		Benson v. Phipps	314, 328
tee Co.	171	Benson v. Zimmers	31
Baxter v. Moore	208	Benson Bank v. Jones	265
Bay v. Thompson	49	Bent v. Hartshorn	131
Baynton v. Morgan	19	Benter v. Dillon	328
Bay, State ex rel. v. Hol-		Bentley v. Dorcas	398
man	302, 379	Benton v. Gibson	141
Beach v. Bates	144	Benton Co. Bank v. Bod-	
Beacon Trust Co. v. Robbins.	343	dicker	59
Beal v. Beck	378	Bernd v. Lynes	285
Beal v. Brown	166	Bernsback v. Reiner	165
Beale's Exrs. v. Common-		Berridge v. Berridge	231, 234
wealth	430	Berry v. Doremus	103
Beaman v. Blanchard	206, 207	Berry v. Pullen	326, 330
Beamon v. Russell	101	Berryman v. Manker	297
Bean v. Chapman	274	Berthold v. Berthold	194
Bean v. Parker	58	Berwald v. Ray	385
Beattie v. Dickinson	198	Bescher v. State	445
Beauchamp v. Supervisors...	407	Best Brewing Co. v. Klas-	
Beaver v. Beaver	169-170, 183, 245, 246	sen	36, 37
Beaver v. Slanker	188	Bethune v. Dozier	243, 294
Bechervaise v. Lewis	272	Beune v. Schnecko	197
Bechtold v. Lyon	44	Bezell v. White	201, 228
Becker v. Northway	272	Bickford v. Gibbs	23, 55, 115, 258
Becker v. Saunders	146	Biddinger v. Pratt	392
Beckham v. Pride	222, 439	Bidwell v. Gephart	349
Beckley v. Munson	168, 169	Bien v. Heath	408
Bedwell v. Gephard	347	Bigelow v. Stilphens	296
		Big Rapids Bank v. Peters....	321

References are to Pages.

Bill v. Barker	277	Boardman v. Paige	227
Billings v. Avery	415	169, 203, 217, 223, 227	
Billings v. Sprague	188	Boardman v. Spooner ...	109, 111
Billington v. Wagoner...	330, 331	Board of Com'rs. v. Branham	294
Bingham v. Mears	247, 248	Board of Education v. Fonda	376
Birkhead v. Brown	128	Board of Education v. Thomp-	
Bird v. Blosssee	112	son	79
Bird v. Gammon	91	Board of School Directors v.	
Bird v. Mitchell	438	Braun	365
Bird v. Munroe	110, 116	Boas v. Maloney	120
Birdsall v. Heacock. .	131, 135, 136	Boatmen's Savings Bank v.	
Bishop v. Day	245, 246	Johnson. .	242, 321, 322, 337, 342
Bishop v. Eaton...	49, 51, 54, 257	Boatwright v. Stewart	387
Bishop v. Rowe	189	Bobbitt v. Shryer	206
Bishop v. Smith	207	Bockholt v. Kraft	188
Bissell v. Saxton.....	361, 377	Boehme v. Murphy	134
Bissig v. Britton	101	Bogarth v. Breedlove	297
Black v. Gentry	406	Boggs v. State	372
Black v. Shreeve	202	Bolling v. Doneghy	203, 204
Blackford v. Gaslight Co.	98	Rollman v. Pasewalk	58
Blackford v. Plainfield Co....	99	Bolton v. Lundy	243
Blackley v. Kenney	332	Bolton v. Fritz	297
Blackman v. Joiner	236	Bonar v. McDonald	302
Blackmore v. Granberry	267	Boncke v. Louttit	142
Blackstone Bank v. Hill	320	Bond v. Sullivan	33
Blackwell v. Wilson	417	Bone v. Torrey	170
Blair v. Hamilton	397	Bones v. Aiken	190
Blair v. Reading	410	Bonham v. Galloway	204
Blair Medical Co. v. U. S. F'id.		Bonner v. Nelson	268
& Guar Co.	265	Bonney v. Bonney	338
Blair v. Snodgrass	109	Bonney v. Seeley	167, 172
Blake v. Cole	101, 207	Bookstaver v. Jayne	28
Blake v. Coons	197	Boone Co. v. Jones	377
Blake v. Pegran	438	Booth v. Eigne	91
Blake v. Sherman	384	Booth v. Irving Nat. Bank..	121
Blake v. White	336	Booth v. Patrick	432
Blakey v. Johnson.....	297, 299	Borchesenius v. Canutson....	
Blalock v. Peake.....	188	94, 98, 100	
Blanchard v. Brown.....	387	Bordell v. Peary	287
Blanke v. Citizens Life Ins.		Boring v. Williams	376
Co.	73	Bosman v. Akeley	143
Blanton v. Rice	266	Bosley v. Taylor	203, 217, 218
Bledsoe v. Nixon	193, 194	Boston v. Brent	182
Bleeker v. Hyde.....	44	Boston v. Farr	88
Bleyer v. Blum	423	Boston, etc. Glass Co. v. Moore	
Block v. Blum	398	.....	131, 136
Block v. Dorman	287	Boston Hat Mfg. Co. v. Messen-	
Block v. Estes	228	ger	302
Bloom v. Warder	141	Bostwick v. Van Voorhis....	70
Bloom & Co. v. Kern.....	136	Boswell v. Colquitt	415
Bloomington Mining Co. v.		Botkin v. Kleinschmidt	446
Searles	137	Botkin v. Middlesboro	102
Blount v. Hawkins.....	100	Bott v. Barr	98
Blow v. Maynard.....	167	Bouchaud v. Dias	223, 338
Blume v. Bowman	59	Boulden v. Estey	397
Blydenburg v. Bingham....	346	Boultree v. Stubbs	
Board v. Coffinburg	365	314, 315, 334, 342	
Board v. Goldsboro	362	Bournaker v. Moore	314
Board v. Sweeney	58	Bourne v. Stevenson	431
Board v. Stahl	385	Boutin v. Etsell	203, 214, 218

References are to Pages.

Boutte v. Martin	239	Bresendine v. Martin	171
Bovill v. Turner	136	Brewer v. Knapp ....138, 266,	267
Bowden v. Lewis	326	Brewer v. Thorp	138
Bowen v. Hoskins	204, 213	Brewing Co. v. Jordan	194
Bowers v. Beck	390	Brewster v. Silence	113, 115
Bowers v. Briggs	297	Bridenbecker v. Lowell....	267
Bowers v. Bryan Lumber Co.	41	Bridgeport Malleable Iron Co.	
Bowker v. Bull	16, 180	v. Iowa Cutlery Works..122,	131
Bowling v. Chambers	243	Bridges v. Blake	286
Bowman v. Blodgett	161, 421	Briggs v. Boyd....168, 169, 211-	359
Bowman v. Humphrey	326	Briggs v. Latham	149
Bowman v. Read	120	Briggs v. Manning	438
Bowman v. Van Kuren	61	Briggs v. Norris	145, 322
Bowman Cycle Co. v. Dyer...	35	Brigham v. Fairweather	34
Bowser v. Rennell	300	Bright v. Lennon.168, 216, 218,	227
Boyd v. Moyle	23, 25	Bright v. McKnight	47
Boyd v. Snyder	47, 52	Brightmann v. Hicks	96
Boydell v. Drummond	109	Briley v. Sugg.....190, 192,	195
Boyer v. Soules	100, 101	Brill v. Holle	15
Boykin v. Dohlond	88	Brinson v. Thomas.....	371
Boyle v. St. John	430	Brinton v. Gerry	350
Braiden v. Mercer	446	Brite v. State	414
Bracken Co. v. Daum	297	Brittain Co. v. Yearout	131
Brackett v. Rich, 143, 144, 146,	257	Britton v. Angier	113
Bradford v. Greenway	30	Broadus v. Rosson	445
Bradford v. Hubbard ..	322	Broadway Bank v. Schmucker	342
Bradford v. McCormick	288	Brockett v. Martin	369
Bradbury v. Morgan	281	Bronaugh v. Neal	272
Bradford v. Morris	197	Bronson v. McCormick Co....	351
Bradford v. Prescott, 333, 338,	340	Brookbank v. Taylor	254
Bradley v. Burwell		Brooking v. Farmers' Bank..	354
213, 225, 280,	315	Brooks v. Castor	241
Bradley v. Cary	49	Brooks v. Hope	283
Bradley v. Fisher	369	Brooks v. Page	401
Bradley v. Mann	298	Brooks v. Tobin	443
Bradley v. Richardson	102	Broome v. U. S.	283
Bradley Engineering Co. v.		Brosseau v. Lowry	18
Heyburne	317, 319	Brostman v. Kramer	19
Braetz v. Warner	137	Broughton v. Bank of Orleans	
Bragg v. Patterson	158, 197	222, 223	
Bragg v. Shain	308	Brounty v. Daniels	399
Bramble v. Ward	323, 335	Browder v. State	414
Branch Bank v. Perdue	241	Brown v. Abbott	345
Brandenburg v. Flynn's Exrs.		Brown v. Bank	111
.....	209	Brown v. Bradford	355
Brandon v. Brandon	181	Brown v. Brown	430
Brandrup v. Empire St. Sur.		Brown v. Curtiss ....97, 141,	255
Co.	294	Brown v. Decatur	189
Braser v. Cox	61	Brown v. Davenport	76
Bratton v. Davidson	433	Brown v. Farmers' Bank	89
Braught v. Griffith		Brown v. Flanders	241, 312
165, 192, 194,	236	Brown v. Hazen	96
Braun v. Hess & Co.....40,	41	Brown v. Jones	409
Bray v. Parcher	24	Brown v. Kidd ....164, 264,	351
Breckenridge v. Taylor		Brown v. Latimore	379
200, 202,	205	Brown v. Lee	201, 202
Breed v. Hillhouse..26, 141, 255,	259	Brown v. Mason	314
Brehm v. U. S. Fid. & Guar.		Brown v. McDonald	222
Co.	444	Brown v. McLaughlin	398
Brentnal v. Helms	161	Brown v. Mosley	367

References are to Pages.

Brown v. Phipps	366	Burkle v. Luce	392
Brown v. Pike	357	Burleigh v. Scott	286
Brown v. Prophit	328	Burnett v. Harwell	430
Browne v. Mt. Holly Bank... 70		Burnett v. Millsaps... 207, 208,	216
Browning v. Porter	188	Burns v. Huntingdon Bank... 209	
Brown v. Ray	232, 234	Burns v. Lynde	63
Brown v. Rathburn	344	Burns v. Parish	161
Brown v. Sneed	379	Burnside v. Fetzner.....15,	250
Brown v. State	435	Burr v. Boyer	348
Brown v. Spiegel	49	Burr v. Wilcox	100
Brown v. Spearer	370	Burrage v. Melson	391
Brown v. Weber	83	Burroughs v. Lott	203
Brown v. White	195	Burrows v. Klunk	299
Brown v. Wright	76	Burrows v. McWhann	
Brownell v. Winnie	300		192, 202, 235
Browning v. Baldwin	134	Burrus v. Cooke	
Bruce v. Coleman	385		164, 192, 194, 176, 196
Bruce v. Edwards	240	Burrus v. Davis	255
Brundridge v. Whitcomb.... 273		Burt v. Horner	146
Bruson v. Brooks	441	Burton v. Anderson	446
Bryant v. American Bonding Co. 124, 363		Bush v. Johnson Co. 371	
Bryant v. Christie	80	Bushnell v. Beavan	89
Bryant v. Crosby	76	Bushnell v. Bushnell	
Buchanan v. Clark	15, 197		162, 165, 201, 204, 214, 217
Buck v. Davenport Sav. Bank 151		Bushnell v. Church	44
Buck v. Sanders	248	Bussier v. Chew	136
Buck v. Smiley	315	Butcher v. Andrews	87
Buckalew v. Smith.....241, 313		Butcher v. Stewart	92
Buckingham v. Murray	48	Butler v. Birkey	196
Buckley v. Fitch	254	Butler v. Sisson	432
Buckli, L. & Son Lumber Co. v. Fidelity & Dep. Co. 385		Butler v. United States	
Buckmaster v. Grundy	217		57, 59, 62
Buckmyr v. Darnall	87, 88	Butler v. Wadley	400
Buckner v. Morris	193	Byers v. Alcorn	224
Buckner v. Stewart	204	Byers v. McClanahan 63, 208	
Buel v. Gordon	421	Byrne v. Muzio	381
Buffington v. Bronson	26	Byrne v. State	363
Buffington v. Smith	418	Cabanne v. Skinker	429
Buhrer v. Baldwin	44	Cabells Ex'rs v. Megginson's Adm'rs	174
Bull v. Allen	239	Cable v. Alvord	423
Bull v. Bliss	141, 144, 145	Cadwallader v. Hirschfield .. 10	
Bull v. Cole	286	Cady v. Sheldon	144
Bullard v. Brown	161	Cage v. Foster	204
Bullard v. De Groffe	41	Cahill v. Bigelow	166
Bullard v. Ledbetter	354	Cahuzac v. Samine.... 48, 144, 257	
Bullock v. Campbell..... 162, 165, 214, 226		Cain v. Vogt	266, 267
Bullow v. Orgo	102	Cal. Canneries Co. v. Scatena 111	
Bund's Est. v. Fid. & Dep. Co. 309		Caldwell v. Campeau	238
Bunn v. Jetmore	58	Caldwell v. Roberts	221
Bunting v. Darbyshire	100	Caldwell v. McKain	114
Buren v. Marquand..... 342		Caldwell v. McVicar	329
Burgess v. Doble	403	Calkins v. Chandler.... 26, 93, 103	
Burgess v. Eve	134, 289	Callaway's Exrs. v. Price's Adm'rs	336
Burk v. Chrisman	198	Calloway v. Sapp	274, 315
Burke v. Cruger	2, 336	Callender, McAuslan & Troup Co. v. Flint	135
Burks v. Albert	267	Calvert v. Good	315
		Calvert v. Gordon	283

References are to Pages.

Calvert v. London Dock Co...	307	Carrollton Furniture Co. v.	
Calvo v. Davis.....	17, 18, 332	Indemnity Co.	73
Cambridge Sav. Bank v. Hyde	295	Carson, etc., Assn v. Muller..	308
Cambridge University v. Baldwin	277, 284	Carson v. Hurst & Co.....	137
Camden v. Doremus.....	144	Carstairs v. Am. Bonding Co,	
Cameron v. Hicks.....	372	.....	72, 75
Camp v. Bostwick.....		Carter v. Black	157
.....	203, 204, 225, 227	Carter v. Duncan	334
Camp v. Simmons	212	Carter v. Hodge	400
Campbell v. Baker	141, 255	Carter v. Moulton	57, 61
Campbell v. Barkley	107	Carter v. Sims	197
Campbell v. Finley	103	Carter v. Tice	447
Campbell v. Floyd	15	Carville v. Crane	89, 105
Campbell v. Gates	28	Casey v. Barbason	4, 91, 115
Campbell v. Knapp	23	Cason v. Heath	264
Campbell v. Mesier	200	Casquet v. Oakley	163
Campbell v. McComb	249	Castellain v. Preston	12
Campbell v. Rothwell	180, 345	Castling v. Aubert	98, 99
Campbell v. Sherman, 4, 241,	347	Caston v. Dunlap	240
Campbell Printing Press Co.		Cates v. Kittrell	145
v. Powell	252	Cathcart v. Foulke	358
Campron v. Whitney	16	Catskill Bank v. Stall.....	40
Canadian Bank v. Coumbe...	319	Catton v. Simpson.....	297
Canby v. Griffin	417	Cauthorn v. Berry	197
Cannon v. Connaway	231, 233	Cave v. Burns	215, 163
Cannon v. Cooper	433	Cellers v. Mechem	318
Cannon v. Grigsby	299	Center v. Hoag	409
Canterbury v. Wills	433	Central Bank v. Shine.....	
Capel v. Butler	348, 346	.....	44, 49, 50, 54
Capen v. Bartlett	393	Central Trust Co. v. First Nat.	
Capital Bank v. Peal	315	Bank	151, 149
Capps v. Smith	27	Chaffee v. Jones.....	204, 206, 217
Cardell v. McNiel	97	Chaffe v. Oliver	176
Cardwell v. Smith	338	Chalaron v. McFarlane	62
Carey v. State	367	Chambers v. Prewitt	250
Carithers v. Stuart	184	Champion v. Brown	246
Cark v. Cress	434	Champion v. Doty	88
Carl v. Meyer	406	Champion v. Plummer	111
Carlisle v. Wilkins	253	Champion Ice M'fg., etc. Co. v.	
Carleton v. Floyd	95	Am. Bonding Co., 6, 73, 126,	307
Carlos v. Ansley	159	Chandler v. Brainerd	202, 218
Carmack v. Com.	356, 368	Chandler v. Higgins	15, 197
Carmichael v. Governor	878	Chandler Lumber Co. v.	
Carnegie Phipps & Co. v. Hul-		Radke	308
bert	365	Chapeze v. Young.....	3, 101, 205
Carothers v. McIlhenny	388	Chapin v. Lapham	89, 100
Carpenter v. Bowen	252	Chapin v. Merrill	100
Carpenter v. Kelley		Chapin v. Waters	428
.....	204, 234, 237	Chapman v. Garber	212, 219
Carpenter v. King	352	Chappell v. John	207
Carpenter v. Provost	279	Chappell v. Spencer	297
Carpenter v. Stevens	393	Chard v. Hamilton	279
Carr v. Davis	246	Charles v. Hoskins.....	356, 367, 377
Carr v. Howard	239	Charleston Bank v. Moore....	402
Carr v. Ladd	283	Charlotte, etc., Co. v. Gow....	290
Carraher v. Allen	102	Chase v. Hathorn	63
Carrier v. Fellows	221	Chase v. Smith	399
Carroll Co. Sav. Bank v.		Chase v. Welty	209
Strother	255	Chase v. Wright	440
		Chenango Bank v. Osgood....	340

References are to Pages.

Cherry v. Wilson	205, 216	City of Deering v. Moore.	338, 339
Chesapeake & O. R. Co. v. Pat-		City of Evansville v. Morris	365
ton	407	City of Fergus Falls v. Ill.	
Chesapeake Transit Co. v. Wal-		Surety Co.	80
ker & Son	309	City of Lowell v. Parker....	
Chester v. Broderick	209, 210		356, 357, 377
Chester v. Kingston Bank....	345	City of Maquoketa v. Willey	348
Chester v. Leonard	308	City of St. Louis v. David-	
Chicago v. Gage	62, 365	son	39, 65
Chicago & Alton R. R. Co. v.		City of Unionville v. Martin.	39
Glenny	12	Clafin v. Briant	48
Chicago Heights Lumber Co.		Clafin v. Ostrom	152
v. Miller	106	Claggett v. Richards	392
Childs v. Davidson	151	Clapp v. Lawton	96
Child v. Eureka Powder Works	167	Clapp v. Rice	
Chilton v. Brooks	18, 332		159, 205, 211, 212, 223
Chilton v. Chapman	232, 237	Clapp v. Webb	95
Chilton v. Robbins	322	Clapper v. Union Bank.....	319
Chipman v. Morrill....	21, 165,	Clark v. Birley	320
200, 201, 202, 203, 216, 226		Clayton v. Field	434
Chipman v. Todd	351, 352	Clark v. First Nat. Bank....	406
Chlemsford Co. v. Demarest.	375	Clark v. Hyman	134
Choate v. Arrington	428	Clark v. Kellogg	143
Choate v. Hoogstraat	109	Clark v. Mallory	338
Choate v. Jacobs	433	Clark v. Merriam	146, 255
Chollar v. Temple	190, 196	Clark v. Mix	433
Chotieu v. Jones	158	Clark v. Norton	392
Chrisman v. Perrin	335	Clark v. Osborn	243
Christian v. Keen	17	Clark v. Remington	257
Christee v. Martien	336	Clark v. Sickler	268, 269
Christman v. Jones	209	Clark v. Sigourney	286, 287
Chrestner v. Brown	336	Clark v. Small	22
Church v. Brown	114, 115	Clark v. Walker	414
Churchill v. Abraham, 384, 387,	388	Clark v. Wilkinson	444
Chute v. Pattee	328	Clarke v. Clay	433
Clark v. Thayer	281	Clarke v. Wallace	40
Clements v. Cassilly	58	Clason v. Bailey	111
Cilley v. Colby	274	Classon v. Billman	120
Citizen's Bank v. Moorman..	337	Clay v. Edgerton	141, 255
Citizen's Loan Assn. v. Nu-		Clay v. Severance	160
gent	375	Clay v. Tyson	103
Citizen's Ins. Co. v. Grand		Clay Co. v. Simonsen	372
Trunk Ry.	126	Clayton v. Coburn	146
Citizen's Nat. Bank v. Top-		Clayton v. Fields	434
litz	318	Clayton v. Kynaston	338
Citizen's Sav. Bank & Trust		Clayton v. Martin	408
Co. v. Babbitt's Estate....	26	Cleaves v. Dockray	426
Citizen's Tr. Co. v. Howell..	153	Clements v. Langley	224
City Bank v. Hopson	255	Cleveland v. Covington....	168
City Bank v. Phelps	47	Clifton v. Lichfield	320
City Bank v. Young, 313, 349, 350		Clinan v. Cooke	109
City Hydraulic Press Brick		Clinton Co. v. Smith	286
Co. v. Nat. Sur. Co.	80	Clopton v. Elkins	296
City Nat. Bank v. Jordan....	76	Clopton v. Spratt	
City Nat. Bank v. Phelps	277		312, 313, 347, 350
City Trust, etc. Co. v. Fid. &		Close v. Close	341
Cas. Co.	126	Closson v. Billman	7, 44
City Trust, etc. Co. v. Lee....	126	Clune v. Ford	25
City of Albany v. Andrews..	253	Coates v. Coates	349
City of Chicago v. Gage.....	62	Cobb v. Kempton	447

References are to Pages.

Cobb v. Little	255	Com. v. Bryan	431
Cobb v. Page	22	Com. v. Cox	444
Cochran v. Kennedy	135	Com. v. Daggett	414
Cochran v. Orr	311	Com. v. Fleming	417
Cochran v. Walker	227	Com. v. Godshaw	372, 374
Cocke v. Hoffman	227	Com. v. Gould	406
Cockrill v. Owen	395	Com. v. Grene	400
Coe v. Buehler	49	Com. v. Haas	351
Coe v. Tough	111	Com. v. Hilgert	430
Coe v. Vogdes	283	Com. v. Hinson	95
Coffin v. Trustees	27	Com. v. Holmes	378, 379
Coggeshall v. Ruggles	167	Com. v. House	418
Coie v. Dallmeyer	362	Com. v. Kendig	79
Colby v. Farwell....140, 143, 144		Com. v. Miller	351
Colby Wringer Co. v. Coon..	289, 290	Com. v. Overby ...413, 418, 419	
Cole v. Vodges	138	Com. v. Parker	415
Cole v. Warner	413	Com. v. Pray	442
Coleman v. Crumpler	398	Com. v. Ramsey	34, 414
Coleman v. Forbes	287	Com. v. Riddle	419
Coleman v. Fuller	7	Com. v. Rogers	436
Coleman v. Hatcher	103	Com. v. Stockton	368
Coleman v. Pike	377	Com. v. Swope	366
Coles v. Pack	132	Com. v. Teal	363
Coles v. Strick	78	Com. v. Webster	419
Coles v. Trecothick	110	Com. v. Wistar	397
Colgin v. Henley	113	Com. v. Wolbert	365
Colgrove v. Tallman.....		Compher v. People	379
	14, 240, 242, 332	Compton v. Jones	159
Collier v. Leonard	438	Comstock v. Creon	351
Collins v. Boyd	161	Comstock v. Keating	358
Collins v. Griffith	280	Conant v. Stratton	433
Collins v. Sinclair	409	Concord Bank v. Rogers..313, 351	
Collins v. Slaughter	443	Concord v. Pillsbury	273
Colquitt v. Smith	416	Condit v. Winslow	429
Colrain, Inhabitants of v. Bell	372	Cone v. Eldridge	194
Columbia, etc. Co. v. Mitch-		Conger v. Robinson	397
ell's Admr's.	335	Conger v. Babbet	79
Columbia Co. v. Massie	370	Congdon v. Reed	136
Combs v. Candler	183	Conkey v. Dickson	439
Comegys v. State Bank....		Conkey v. Dickinson	445
	217, 232, 238	Conn. v. Coburn	163
Commercial Bank v. Cheshire		Conn. v. State	307
Provident Institution	150	Connolly v. Dolan	218
Commercial Bank v. Cunnig-		Connor Co. v. Aetna Indem-	
ham	319	nity Co. ....154, 155	
Commercial Bank v. Hennin-		Connor v. Howe	188
ger	270	Connor v. State	417
Commercial Nat. Bank v. Kirk-		Conover v. Hill	225
wood	19	Conrad v. Foy	241
Commercial Nat. Bank v.		Conrad v. Sullivan	100
Smith	93, 95	Continental National Bank v.	
Commercial Bank v. Western		Clarke	32
Bank	349	Conway v. Cunningham.....	137
Commissioner v. Lineberger..		Conwell v. McCowan.....	15
	372, 373	Cook v. Chapman	409, 410
Com. v. Adams	362	Cook v. Freudenthal	414
Com. v. Baxter	356, 411	Cook v. Ligon	401
Com. v. Bolton	415	Cooke v. Crawford	399
Com. v. Brickett	412, 413	Cooke v. Nathan	142
		Cooke v. Orne	43, 46, 48

References are to Pages.

Coombe v. Wolf.....	325	Cox v. Bailey	287
Coon v. Rigden	111	Cox v. Machine Co.	45
Coope v. Twynan	207	Cox v. Railroad Co.	330
Cooper v. Chambers	92	Coyles v. U. S. Fid. & Guar. Co.	153
Cooper v. Dedrick	152	Grace, In re	283
Cooper v. Evans	58	Craft v. Isham .47, 48, 52, 53,	258
Cooper v. Gibbons	91	Crafts v. Mott .....21, 183,	196
Cooper v. Jackson	26	Crafts v. Tritton	159
Cooper v. Jenkins	182, 183	Cragoe v. Jones	337
Cooper v. National Fertilizer Co.	246	Craig v. Ankeney	200
Cooper v. People	370	Craig v. Craig	162
Cooper v. State	418	Craig v. Parkis ....143, 146,	152
Cooper v. Wilcox	351	Craig v. Phipps	141
Co-operative Assn. v. Rohl ..	400	Craighead v. Swartz	245
Coots v. Farnsworth	264	Cramer v. Redman	233
Cope v. Joseph	87	Crane v. Specht .....276, 277	
Cope v. Smith	241	Crane v. Wheeler	97
Copeland v. Collins	287	Cranmer v. McSwords	168
Copis v. Middleton		Crathern v. Bell	135
188, 190, 191, 237		Craven v. Freeman	
Corbet v. Waterman	332	215, 223, 225, 227	
Corcoran v. Judson	410	Crawford v. Hazelrigg	30
Cordier v. Thompson	255	Crawford v. King	98, 100
Core v. Wilson	212	Crawford v. Morrill	107
Corey v. White	189, 192	Crawford v. Turk	356, 377
Corielle v. Allen	330	Crawford v. Paine	407
Corlies v. Fleming	287	Crawn v. Com. ....374, 376	
Corn v. Schryock	439	Craythorne v. Swinburne	
Cornish v. Wilson	430	201, 202, 205, 206, 208, 214,	216
Cornwall v. Gould	170	Crears v. Hunter	26
Corrigan v. Foster	435	Creath's Adm'r v. Sims, ...	284
Cortelyou v. Maben	389	Cremer v. Higginson	
Corydon Deposit Bank v. Mc- Clure	265	48, 131, 256, 284	
Cosgrave Brewing & Malting Co. v. Starrs	135	Crigler v. Bedel	28
Coster v. Mesner	337	Crim v. Fitch	102
Cothern v. Connaughton .34,	398	Crim v. Fleming	346, 349
Cotton's Admr. v. Wolf, ...	441	Crippen v. Thompson	174
Couch v. Mills	340	Cripps v. Hartnoll	100
Couch v. Terry	203	Crisfield v. Murdock	
Coulhart v. Clementson	281	179, 228, 229	
Court of Insolvency v. Meldon	397	Crisfield v. State	192
County Commissioners v. Jones	373	Crittenden v. Fisk	47, 132
County of Scott v. Ring	375	Criva v. Fleming	337
Courson v. Browning	399	Crocker v. Gilbert	115
Courtis v. Dennis .....4,	257	Croft v. Moore	235
Couturier v. Hastie	102	Crofts v. Beale	24, 27
Cowan v. Roberts ..25, 47,	51	Cromer v. Cromer's Admsr... 193	
Cowden v. Trustees	377	Crompton v. Pratt	266
Cowdery v. Hahn .....295,	308	Cromwell v. Hewett	141
Cowell v. Edwards	202	Crosby v. Roub	151
Cowenhoven v. Howell	93	Crosby v. Wyatt	3, 336
Cowles v. Peck	142	Cross v. Allen	16, 287
Cowles v. U. S. Fidelity & Guaranty Co.	124	Cross v. State Bank	62
Cowles v. U. S. Fid., etc. Co.	310	Crossman v. Walleben ..328,	329
Cowper v. Smith	337	Crowder v. Morgan	398
		Croughton v. Duval	240, 245
		Crozier v. Grayson.....172,	218
		Crum v. Wilson	355, 428
		Crumlish v. Central Imp. Co.	186

References are to Pages.

Crystal Ice Co. v. United Sur. Co.	66, 124, 125	Davis v. Emerson	217, 218
Culliford v. Walser	209, 411, 415, 422	Davis v. Hatcher	241
Culmer v. Wilson	227	Davis v. Huggins	311
Culp v. Stanford	443	Davis v. London, etc. Co. ..	67
Cumberland Co. v. Pennell ..	373	Davis v. McEwen Bros.	348
Cumming v. Brown	368	Davis v. Mikell	351
Cummings v. Garen	391	Davis v. Mills	47
Cummings v. Little	345	Davis v. Patrick .. 82, 88, 94,	248
Cummins v. Cassily	39	Davis v. People	380
Commons v. Hackley	171	Davis v. Railroad Co.	36
Cunningham v. Clarkson	421	Davis v. Shields	112
Curran v. Colbert	350, 259	Davis v. Smith	192
Currie v. Misa	23	Davis v. South Carolina	414
Currie v. Stewart	434	Davis v. Statts	30
Currier v. Baker	222	Davis v. Stout	326, 329
Currier v. Fellows	212, 232	Davis v. Toulmin	228, 237
Curry v. Bank	343	Davis v. Van Buren	279
Curtis v. Brown	96, 99	Davis v. Vass	192
Curtis v. Smallman	142	Davis v. Wells Fargo Co. 25, 43, 44, 45, 50, 255, 256,	257, 259
Curtis v. Tyler	251, 345	Davis, Belan Co. v. Nat. Sure- ty Co.	27
Cutler v. Ballou	131, 136	Davis Machine Co. v. Richards	43, 48, 49, 51
Cutler v. Dickinson	428	Dawes, etc. v. Boylston	432
Cutler v. Hinton	88	Dawson v. Bank	17, 270
Cutter v. Emery ..100, 207,	219	Dawson v. Lee	166
Cuyler v. Wayne	440	Day v. Bach	384
Dahlman v. Hammel	114	Day v. Elmore	114, 145, 146, 248, 347, 349
Dair v. United States ....57,	59	Day v. Ramey	351
Dale v. Com.	419	Day, State ex rel. v. Holman.	302
Daly v. Gibson	408	Dean v. Newhall	333, 340
Daly v. Old	306	Dean v. Smith	423
Dampskibssaktieselskabet Ha- bil v. U. S. Fid. & Guar. Co.	358	Dean & Co. v. Collins	15
Dana v. Conant	144	Deatherage v. Scheidley	401
Dane v. Corduan	239	Deblois v. Earle	138, 310
Dane v. Gilmore	356, 378	De Berry v. Withers	159
Daniel v. Ballard	208	De Camp v. Bullard	409
Daniel v. McRae	211	Decker v. Pope	156
Daniels v. Barney	79	Decosta v. Davis	117
Danker v. Jacobs	184, 194	Dederick v. Bleyker	18
Darling v. McLean	336	Denio v. State	379, 380
Darst v. Bates	97	Dennie v. Smith	357, 378
Dart v. Sherwood	273	Dennis v. Rider	239
Darrell v. Tibbitts	12	Denison v. Gibson ..16, 17, 78,	79
Davenport v. King	335	Dennison v. Mason	397
Davenport v. Olmstead ..447,	448	Dennison v. Soper	161, 162
Davenport v. Richards	429	Denny v. Reynolds	393
Davey v. Pendergrass	314, 321, 334	Denny v. Williams	117
Davidson v. Cooper	296	Denton v. Lytle	211
Davidson v. McGregor	342	Deposit Bank v. Peak	24
Davidson v. Taylor	415	Derosset v. Bradley	218
Davies v. Humphreys	161, 162, 201, 204, 213, 214,	Derry Bank v. Heath	410
Davis v. Barrington	211	De Sot v. Ross	186
Davis v. Bauer	164	Dessar v. King	160
Davis v. Board	163	Detroit Dime Sav. Bank v. Ziegler	303
Davis v. Clark	287	Devers v. Ross	314, 334
Davis v. Commissioners	35		

References are to Pages.

Deegan v. Deegan	357	Doll v. People	377
Deering v. Earl of Winchelsea, 192, 200, 201, 202, 205, 206, 207, 216, 229, 230, 231		Dome v. Eldridge	378
Deering v. Moore	58, 338, 339	Domestic Sewing Mach. Co. v Jackson	68, 70
Deering v. Mortell	44	Domestic Sewing Mach. Co. v. Webster	305
Deering v. Russell	145	Donegan v. Moran	161
Deere Plow Co. v. McCollough	43	Donley v. Camp	141, 254
Defan v. Wright	310	Donnell Co. v. Jones ..	62, 289, 384
De Grieff v. Wilson	357	Donnerberg v. Oppenheimer..	149
Deitzler v. Mishler	197, 198	Doolittle v. Dwight	170
Delano v. Kennedy	384	Dorman v. Bigelow	113
Delaware, etc. R. Co. v. Oxford Iron Co.	167, 245	Dorsey v. Dorsey	279
De Mattos v. Jordan	24	Dorsey v. Wayman	165
Demeritt v. Bickford	100	Douglas Co. v. Bardon....	58, 60
Dempsey v. Bush. 181, 192, 197,	236	Douglass v. Ferris....	279, 446, 447
De Myer v. McGonegal	411	Douglass v. Howland 115, 255, 356, 357,	378
Devol v. McIntosh	172	Douglass v. Jones	89
Dewey v. Allgire	34	Douglass v. Kessler	442
Dewey v. Clark Inv. Co.	144, 145	Douglass v. Reynolds 47, 48,	53
Dewey v. Reed	295, 297	Dove v. Covey	398
De Wolf v. Raband	115	Dover v. Robinson	62
Dexter v. Blanchard	29, 89	Dover Stamping Co. v. Noyes	135
Dexter, Horton Co. v. Sayward	400	Dow v. Swett	97
Dey v. Martin	315, 343	Dowbiggen v. Bourne	188
Dick v. Stokes	415	Dowling v. Ford	286
Dickson v. Conde	102	Downer v. Baxter	168
Diehl v. Davis	17	Downer v. Dana	273
Dierolf v. Winterfield	390	Downes v. Cheeseborough ..	116
Dillaby v. Wilson	93	Downey v. Washburn	189
Dillaway v. Peterson	328	Downing v. Funk	26
Dillenbeck v. Dygert	200, 211	Drake v. Coltran	192
Dillman v. Nadelhoffer	144	Drane v. Bayliss	445
Dillon v. Anderson	58	Draper v. Snow	114, 115
Dillon v. Schofield	209	Draper v. Weld	21, 333, 340
Dime Sav. Bank v. Am. Sur. Co.	72	Draughan v. Bunting....	222, 223
Dinkgrave, Succession of	167	Drefahl v. Tuttle	190
Dinsmore v. Tidball	69, 70	Drew v. Chamberlin	403
Dismukes v. Shafer	31	Drew v. Lockett	180
Dixon v. Ewing	351	Dreyfus v. Peruvian Guano Co.	409
Dixon v. Spencer	334	Driscoll v. Winters	294
Dixon v. Steele	249	Drummond v. Prestman 122, 355, 356	
Dixon v. Vandenburg	279	Drury v. Young	111
Dobbin v. Bradley	122	Dry v. Davy	134
Dobie v. Fidelity & Guar. Co.	246	Dubuque First Nat. Bank v. Carpenter	53, 149
Dobson v. Prather	352	Duck v. Mayeu	340
Dobyns v. McGovern	283, 430	Dufan v. Wright	138
Dock v. Boyd	103	Duffield v. Scott	356
Dodd v. Dreyfus	332	Dugan v. Champion Coal, etc. Co.	41
Dodd v. Viccovitch	310	Dult v. Admr. Genl. of Bengal	64
Dodd v. Whelan	281	Durant v. Allen	93
Dodd v. Wilson	189	Dumphy v. Whipple	375
Dodd v. Winn	38, 202, 352	Dunbar v. Brown	257, 258
Dodgson v. Henderson	328	Dunbar v. Fleisher	27
Dolbeer v. Livingston	62	Dunbarton v. Palfrey	415
Dole Co. v. Cosmopolitan Co.	58		
Doll v. Cooper	385		
Doll v. Crume	307		

References are to Pages.

Duncan v. Blair	107	Electric Appliance Co. v. Fid. & Guar. Co.	308
Duncan v. Heller	49	Elkinton v. Newman	189
Duncan v. Kiefer	160	Elkins v. Hart	89
Duncan v. United States	60	Ellesmere Brewery Co. v. Cooper	62, 216, 217
Duncan, Fox & Co. v. North and South Wales Bank..	8, 181	Ellett v. Britton	113
Dunham v. Peterson	151	Elliott v. Black	392
Dunlop v. James	177	Elliott v. Giese	22, 24
Dunn v. Parsons 344, 346, 349,	350	Ellis v. Deadman	109
Dunn v. Slee	222	Ellis v. Emmanuel	207
Dunn v. Sparks	224	Ellis v. Johnson	431
Dunning v. Humphrey	385	Ellis v. Jones	49, 359
Dupree v. Blake	276	Ellis v. Land Co.	213, 246
Durand v. Bowen	146, 144	Ellis v. McCormick	295
Durbin v. Kuney	204, 214	Ellis v. Roscoe	197
Durell v. Wendel	333, 340	Ellis v. S. W. Land Co.	158
Durfee v. Joslyn	434	Ellis v. Wilmot	274
Dusol v. Bruguere	159, 227	Ellison v. State	416
Dwight v. Scranton Lumber Co.	182	Ellwood v. Monk	92
Dye v. Dye	312, 397	Ellsworth v. Harmon	152
Dyer v. Gibson	97, 116	Ellsworth v. Lockwood	191
Dykers v. Townsend	110	Elmendorph v. Tappen	161
Dysart v. Crow	202, 203	Elms v. Wright-Blodgett Co.	409
Eads v. Retherford	200	Elting v. Vanderlyn	26
Eagles v. Kern	357	Elwood v. Deifendorf	183
Eagle Mowing & R. Mach. Co. v. Shattuck	97	Ely v. Bibb	142
Easter v. White	101	Emerson v. Slater	94
Easterly v. Barber ..	202, 210, 211	Emerson Mfg. Co. v. Rustad..	44
Eastman v. Foster	253	Emery v. Baltz	289, 290
Eastern Ry. Co. v. Loring ..	304	Emery v. Burbank	116
Eastwood v. Kenyon	24, 102	Emery v. Vinall	169
Eaton v. Bartscherer	387	Empire State Sur. Co. v. Car- roll Co.	364
Eaton v. Harth	119	Enders v. Brune	189, 193, 199
Eaton v. Lambert	236	England v. McKamey	243
Eaton v. Waite	240	English v. Bourne	243, 244
Eaton v. Whitmore	328	English v. Darley	317, 326, 343, 350
Eberhardt v. Wood	224	English v. Landon	328
Eckert v. Lewis	297	English v. Newell	430
Eckman v. Hammond	386	English v. Reed	384
Edelen v. Gough	114, 115	English v. State	448
Edwards v. Bodine	409	Enicks v. Powell	435
Edwards v. Coleman	323	Enterprise Hotel Co. v. Book.	310
Edwards v. Davenport	35	Eppes v. Randolph	192
Edwards v. Edwards	410	Eppich v. Clifford	114
Edwards Co. v. Jennings	35	Ericson v. Brandt	22
Eden v. Chaffee	91	Ernst v. Hogue	393
Edgerly v. Emerson..	149, 177, 195	Erwin v. Coml. Bank	387
Egerton v. Alley	198	Erwin v. Lamborn	256
Edmonson v. Drake	48	Esch v. White	100
Edmunds v. Harper	271, 272	Eshleman v. Bolenius	229
Edmonds v. Sheahan	218	Estate of Ramsay v. People ..	364, 365, 371
Edwards v. Kelly	99, 104	Estate of Rapp v. Phoenix Ins. Co.	281, 283, 289
Edwards v. Mattingly....	297, 301	Estey v. Harmon	393
Ege v. Barnitz	145	Eureka Co. v. Long	58
Eggeman v. Henschen	342	Evans v. Bell	141
Eilbert v. Finkbeiner	110		
Eising v. Andrews	288		
Elzer v. Kutner....	385, 387, 388		

References are to Pages.

Evans v. Bembridge	59, 338	Farrington v. Secor	448
Evans v. Commonwealth	356	Farrow v. Respass	141, 256
Evans v. Faircloth	33	Farwell v. Sully	54
Evans v. McCormick	49	Fassnacht v. Emsing Gagen	
Evans v. Raper	345	Co.	66, 68
Evansville v. Morris	365	Fasnacht v. Winkleman	138
Evansville Nat. Bank v. Kauf-		Father Matthew, etc., Soc. v.	
mann	122, 128, 152, 277	Fitzwilliam	360, 423
Everly v. Rice	268, 344, 346, 350	Faulkner v. Brigel	387
Everson v. Gere	128, 149, 152	Faulkner v. Cumberland Val-	
Evooy v. Tewksbury	114	ley Bank	270
Ewen v. Lancaster	314	Faulkner v. Gilbert	26
Ewing v. Williams	312	Faulkner v. Thomas	101
Executors of Dennis v. Rider	239	Faurot v. Gates	203
Ex parte Gifford 321, 337, 338,	341	Faurote v. State	362
Ex parte Glendenning	321	Fawcett v. Freshwater	328
Ex parte Harvey	342	Fawcetts v. Kimmey	188
Ex parte Jacobs	274	Fay v. Ames	356, 378
Ex parte Morris	251	Fay v. Edmiston	356, 377
Ex parte Pettillo	249	Fay v. Fay	186
Ex parte Rushforth	167, 169	Fay v. Hall	48
Ex parte Waring	250	Fay v. Hurd	440
Exall v. Partridge	16	Fay v. Jenks	27, 28
Eyre v. Bartopp	314	Fay v. Tower	322, 323
Eyre v. Everett	311	Fears v. Riley	408
Fagan v. Jacocks	221, 232	Fears v. Story	98
Fahey v. Frawley	172	Feazle v. Dillard	170
Fairbanks Co. v. Am. Bonding		Feemster v. Anderson	401
& Tr. Co.	306	Fegley v. McDonald	144, 268
Fairbanks v. Lambert	275	Fehlinger v. Wood	96
Fairbanks v. Snow	77	Fehr Brewing Co. v. Mullican	352
Fairchild v. Keith	369	Feller v. Gates	366
Faires v. Cockrell		Fellows v. Prentiss	335
	165, 190, 191, 226	Felton v. Bissel	188, 192
Fairfax v. Fairfax	424	Felton v. Sowles	425
Fales v. McDonald	317	Feltz v. Clark	424, 425
Fall v. Youmans	140, 146, 143, 144	Fennell v. McGowan	349
Fallowes v. Taylor	22	Fennell v. McGuire	133
Famelener v. Anderson	63	Fenton v. Fidelity Co.	124
Fanning v. Murphy	326, 327	Fentress Co. v. Reed	373
Farebrother v. Simmons	111	Fergus Fall v. Ill. Sur. Co. ..	80
Farebrother v. Wodehouse...		Ferguson v. Carson	189, 192
	180, 184	Ferguson v. Glidewell	390
Farley v. Cleveland	92, 96, 102, 103	Ferguson v. Trovaten	111
Farmers & Traders Bank v.		Ferguson's Adm'r v. Carson's	
Harrison	331	Admr.	189, 192
Farmers & Merch. St. Bank v.		Fernan v. Doubleday	330
Verdon	307	Ferrell v. Maxwell	101
Farmers Bank v. Blair	342	Ferrer v. Barrett	245
Farmers Bank v. Boyd	31	Fertig v. Bucher	60
Farmers Bank v. Braden ...	68	Fewlass v. Keshan	283
Farmers Bank v. Horsey	314	Fidelity & Casualty Co. v.	
Farmers Bank v. Kercheval .	131	Bank	290, 291
Farmers Bank v. Snodgrass. .	232	Fidelity & Casualty Co. v.	
Farmers Bank v. Tatnall ...	48	Ballard	95
Farmers Bank v. Teeters ...	232	Fidelity & Casualty Co. v.	
Farmers, etc. Bank v. Rath-		Eickhoff	174, 176, 175, 263
bone	211	Fidelity & Casualty Co. v.	
Farmers, etc. Co. v. U. S. Fid.		Gate City Nat. Bank	
& Guar. Co.	65, 302, 303		260, 262, 292, 307

References are to Pages.

Fidelity & Casualty Co. v. Harder	175	First Nat. Bank v. Fid. & Dep. Co.	308
Fidelity & Deposit Co. v. Agnew	308	First Nat. Bank v. Fid. & Guar. Co.	73
Fidelity & Deposit Co. v. Bowen	398	First Nat. Bank v. Finck ...	15
Fidelity & Deposit Co. v. L. Buckli & Son Lumber Co.	385	First Nat. Bank v. Gerke	302, 303, 306
Fidelity & Deposit Co. v. Butler	443	First Nat. Bank v. Lineberger	321
Fidelity & Deposit Co. v. Courtney	74, 261	First Nat. Bank v. Parsons ..	350
Fidelity & Deposit Co. v. Phillips	216, 229, 444	First Nat. Bank v. Samuelson	374, 375
Fidelity & Deposit Co. v. Rich	446	First Nat. Bank v. Schreiner	270
Fid. & Dep. Co. v. State	371	First Nat. Bank v. U. S. Fid. & Guar. Co.	260
Fid. & Guar. Co. v. Ridgley ..	72	First Nat. Bank v. Wilbern ..	350
Fid. & Guar. Co. v. Western Bank	293	First Nat. Bank v. Wood	242, 245, 248
Fidelity Co. v. Jordan	190, 192	Fischer v. Gathier	203
Fidelity, etc. Co. v. Bowen ..	209	Fish v. Thomas	100
Fidelity, etc. Co. v. Lawler ..	100	Fishback v. Weaver ...	231, 234
Fidelity Mut. Life Ins. Co. v. Dewey	305	Fisher v. Fallows	421
Fidler v. Hershey	241, 243	Fisher v. Stockebrand	268
Field v. Buir Br'g Co.	37	Fisk v. Rickel	135
Field v. Campbell	32	Fitch v. Citizens Nat. Bank ..	254
Field v. Pelot	232	Fitch v. Hammer	195
Field v. Sampson	3	Fitton, In re	418
Fielden v. Lahens	279	Fitzgerald v. Dressler	98
Fielding v. Waterhouse	232	Fitzgerald v. Reed	34
Fields v. Willis	7	Fitzgerald v. Trant	340
Fifty Associates v. Grace ...	19	Flanagan v. Duncan	229
Filbert v. City of Philadelphia	309	Flanagan v. Forrest	171
Filon v. Miller Brewing Co. ..	37	Fleming v. Beaver ..	192, 196, 197
Findley v. Hill	240, 325	Fleming v. Bailey	409
Finley v. King	351	Fleming v. Odurn	350
Finney v. Condon	308, 309	Flentham v. Steward	255
Fire Ins. Co. v. Am. Bonding Co.	360	Fletcher v. Austin	60
Firemen's Ins. Co. v. McMillan	357	Fletcher v. Grover	201, 222
First Bank v. Babcock	255	Fletcher v. Jackson ..	159, 168, 217
First Bank v. Dohm	100	..... 218, 222, 356, 357, 359	
First Bank v. Homesley	240	Fletcher v. Sanders	429
First Bank v. Shreiner	269	Flinn v. Carter	339
First Bank v. Skidmore	315	Flournoy v. Van Campen ...	107
First Bank v. Woolsey	189	Fogarty v. Ream	442
First Com'l Bank v. Talbert ..	277	Fogel v. Blitz	135
First Nat. Bank v. Babcock ..	11	Foley v. Ins. Co.	12
First Nat. Bank v. Briggs ..	23, 375	Folk v. Cruikshanks	313
First Nat. Bank v. Carpenter	52, 53, 152	Folkes v. Docminique	425
First Nat. Bank v. Chalmers ..	103	Foltz v. Tradesman's Tr. Co. ..	153
First Nat. Bank v. Cheney ..	333, 345	Foote v. Brown	256
First Nat. Bank v. Davis ...	250	Forbes v. Farrington	444
		Forbes v. Jackson	181, 185
		Forbes v. Shepperd	314, 341
		Ford v. Beech	339
		Fordam v. Wallace	215
		Forest County v. Dawley ..	363, 368
		Forest v. Stewart	144, 146
		Forrest's Exrs. v. Luddington ..	250, 253

References are to Pages.

Fort Worth Bank v. Daugherty	190	Fuller v. Lohring	248
Forth v. Staunton	98	Fuller v. Scott	256
Foster v. Barney	146	Fuller v. Tomlinson Bros. 347, 349	
Foster v. Birch	434	Fullerton v. Hill	10
Foster v. Johnson	217, 204	Fulmer v. Seitz	297
Foster v. Purdy	339	Fulton v. Colerick	377
Foster v. Stafford Nat. Bank	409	Fulton v. Harrington	195
Foster v. Stother	173	Furbish v. Goodnow	86, 91
Foster v. Tolleson	141	Furnas v. Durgin	173
Fotterall v. Floyd	396	Furness v. Read	387
Fourth Nat. Bank v. Spinney	303	Furst v. Bradley	25, 257
Fowler v. Allen	61, 62	Furguson v. Turner	351
Fowler v. Brooks	323, 328	Furman v. Furman. 159, 193, 196	
Fowler v. Croker	333	Furnold v. Bank 197, 235, 236	
Fowler v. Strickland 166, 168		Fyler v. Givens	113
Foxworth v. Bullock	30	Gadsden v. Brown	185
Foye v. Bell	444	Gadsden v. Quackenbush 138	
Foye, In re	251	Gaff v. Sims	255
Frank v. Edwards	305	Gage v. Lewis	172
Frank v. Taylor	193, 199	Gage v. Mechanic's Bank ... 255	
Franklin Bank v. Cooper 69		Gage v. Sharp	61
Franklin Co. v. Courtney 297		Gahn v. Niemcewicz	16
Franklin v. Franklin	243	Gailbraith v. Fullerton 331	
Franklin v. Thurber	419	Gailbraith v. Martin	210
Frantz v. Saylor	410	Gall v. Fehr	16
Frazer v. Jordan	320	Gallagher v. People	416
Freamster v. Witherow 167		Gallagher v. White 149, 152	
Freaner v. Yingling		Gallagher v. Nichols	92
181, 311, 312, 313, 345, 347		Galliher v. Galliher	198
French v. Yawger	105	Galloway v. Yates	400
Frederick v. Tracey	391	Galloway Coal Co. v. Hunter. 7	
Freeman v. Brewster	445	Gamage v. Hutchins 141, 323	
Freehold Co. v. Brick	248	Gambill v. Campbell 431, 407	
Freeman v. Cherry	211	Gamble-Robinson Co. v. Mass. Bonding & Ins. Co. 260, 261	
Freeman v. Kellogg	425	Gammage v. Hutchins	256
Freman's Bank v. Rollins ... 337		Gammel v. Barramore	255
Freeport v. Bartol	109	Gannet v. Blodgett	182, 184
Freise v. Einstein	120, 121	Gano v. Samuel	40
Freigh v. Ames	240	Gano v. Thierne	187
Frelinghausen v. Baldwin.... 290		Gansey v. Orr	101
French v. Marsh	140, 143	Gardner v. Brown	394
Frevert v. Henry	156, 194	Gardner v. Lee's Bank	275
Friedman v. Peters	52	Gardner v. Lloyd	49
Friend v. Ralston	120	Gardner v. Walsh. 297, 300, 301	
Friendly v. Nat. Sur. Co. 308		Gardiner v. Harback 298, 300	
Frith v. Sprague	163	Gargan v. School Dist. 277, 284	
Frohart Bros. v. Duff. 93, 94, 98		Garnett v. Macon	340
Frost v. Standard Metal Co. 43, 135, 137		Garrett v. Reese	442
Frost & Co. v. Weatherbee .. 136		Gartley v. People	373
Frothingham v. Petty	434	Garvin v. Garvin	197
Frownfelter v. State	381	Gary v. Cannon	248
Frundly v. Nat. Sur. Co. 309		Gary v. State	62
Fulcher v. Com. 433		Gastonia v. McEntee, etc. Co. 248	
Fullam v. Adams. 93, 96, 100, 103		Gasquet v. Thorn	255
Fullam v. Valentine	341	Gates v. McKee. 114, 121, 122, 133	
Fuller v. Davis	417, 420	Gatto v. Warrington	120
Fuller v. Hapgood	233	Gaunt v. Hill	47
Fuller v. John S. Davis' Sons 176		Gaussen v. U. S. 379, 380	
		Gavisk v. McKeever	398

References are to Pages.

Gay v. Grant	432	Gilmore v. Skookum Box Fac-	
Gay v. Murphy	58, 59, 60	tory	103
Gay v. Ward	122, 131, 139, 281	Gilpin v. Hord	397
Geer Machinery Co. v. Sears	45, 54	Gillinan v. Strong	257, 378
Geiger v. Clark	48	Gimperling v. Haynes	399
Geiske v. Johnson		Gipson v. Ogden	331
165, 167, 168, 179, 194		Girard v. Haddan	299
General Ry. Signal Co. v. Title		Gist v. Drakely	35
Guar. Co.	59, 65, 187	Gladsden v. Brown	186
General Steam Navigation Co.		Glass v. Thompson	349
v. Rolt	307	Glass v. Stinson	302
Geneser v. Weismer	354	Glasscock v. Hamilton	
George v. Andrews	17	203, 204, 215, 221, 222, 227,	
George v. Bacon	210	232, 338, 359	
George v. Hewlette	393	Glazier v. Douglass	351
George v. Snowden	332	Glendenning, Ex parte	321
Gerber v. Ackley	366, 367	Glenn v. Morgan	334
Gerber v. Sharp	182	Glenn v. Wallace	209
German Am. Bank v. Drake		Glidden v. U. S. Fid., etc. Co.	
48, 51, 54		71, 75	
German Am. Bank v. Fritz		Globe Sav. & Loan Co. v. Em-	
192, 197, 235, 236		ployers, etc. Co.	262
German Am. Bank v. Hanna.	151	Glossin v. Brown	188, 191
German Am. Sav. Bank v.		Glossop v. Harrison	156, 406
Drake Roofing Co.	257, 258	Glover v. Robbins	297
German Assn. v. Helmricks ..	315	Goddard v. Whyte	178
German Bank v. Foreman ..	270	Godden v. Pierson	100
Germania Life Ins. Co. v.		Godfrey v. Rice	164, 165, 227
Casey	19	Goepel v. Swinden	221
Gerson, In re	276	Gold v. Phillips	103
Getty v. Binsse	279	Goldman v. Fid. & Dep. Co.	
Getty v. Schantz	143, 145	66, 73, 75, 263	
Ghiselin v. Ferguson	198	Golsen v. Brand	
Gibbs v. Blanchard ..	23, 83, 90	162, 205, 206, 212, 226	
Gibbs v. Cannon	257	Goldsmith v. Stewart	176
Gibbs v. Frost	62	Goltz v. Foss	102
Gibbs v. Johnson	386	Gomez v. Lazarus	211
Gibbs v. Mennard	245, 246	Gondolfo v. Walker	426
Gibson v. Beckham	426	Good v. Golden	182
Gibson v. Gishback	424	Good v. Martin	23
Gibson v. Holland	110	Goodacre v. Skinner	239, 312
Gibson v. Shehan	205, 231	Goodall v. Wentworth....	204, 215
Gifford Ex parte		Goodbar v. Lindsley	385
321, 341, 337, 338, 341		Goodell v. Bates	29
Gifford v. Rising	189	Goodloe v. Clay	232, 238
Gilbert v. Adams	174	Goodman v. Chase	92
Gilbert v. Anthony	63	Goodman v. Merc. Guar. Co. .	127
Gilbert v. Duncan	431, 434	Goodwin v. Simonson	243
Gilbert v. Wiman	174, 285	Goodyear Co. v. Bacon	58
Gill v. Morris	355	Goodyear v. Watson	192, 197
Gillen v. Peters	15	Gookin v. Sanborn	438
Gillies v. Mahony	93	Gookin v. True	433
Gillispie v. Campbell	210	Gore v. Wilson	211
Gillespie v. Torrance	272	Gordon v. Funkhouser	39
Gillighan v. Boardman		Gordon v. Moore	338, 339
113, 144, 146		Gosman v. Cruger	31
Gillilan v. Ludington	244	Goss v. Gibson	224
Gilman v. Kibler	113	Goudy v. Gillam	287
		Gould v. Fuller	233
		Gould v. Gould	159

References are to Pages.

Gould v. Steyer	433	Grider v. Payne	192
Gourdin v. Read	62	Griesmere v. Thorn	351
Gourley v. Tyler	14	Griffin v. Cunningham	98
Governor v. Hancock	367	Griffin v. Derby	92
Governor v. Perrine	366	Griffin v. Kelleher	202
Governor v. Ridgeway	379	Griffin v. Long	158
Governor v. Williams	429	Griffin v. Zuber	125
Gowan v. Hanson	384	Griffith v. Rundle	155, 307
Gower v. Stuart	103, 104	Griffiths v. Sitgreaves	77
Grady v. Hughes	427	Griggs v. Huston	371
Graff v. Kahn	271, 272	Grim v. School Directors	59
Grafton v. Hinkley	295, 357	Grimmet v. Henderson	433
Graham v. Swigert	396	Grinestaff v. State	413
Granite Nat. Bank v. Fitch ..	177	Grisard v. Hanson	345
Graham v. Bradley	142, 146	Griswold v. Hinson	347
Grant v. Ludlow	250	Grocers Bank v. Kingman ..	123, 304
Grant v. Naylor	278	Grommes v. St. Paul Trust	
Grant v. State	419	Co.	19, 310
Graves v. Bueckley	377	Gross v. Davis	
Graves v. Johnson	211, 219	168, 200, 203, 213, 216, 217, 218	
Graves v. Lebanon Nat. Bank		Gross v. Weary	400
70, 381		Grotte v. Wiel	15
Graves v. Tucker	60	Grubb v. Bullock	419
Gravett v. Malone	447	Grubbs v. Wysors	180, 184
Gray v. Bowls	157	Guarantee Co. v. Mechanics	
Gray v. Blum	263	Sav. Bank & Trust Co.	261
Gray v. Farmer's Bank ..	335, 240	Guarantee Co. v. Mechanics	
Gray v. Gaither	424	Sav., etc. Co.	72, 74
Gray v. Herman	91	Guarantee Co. v. Nat. Bank ..	73
Gray v. Merchants Ins. Co. ..	127	Guarantee Co. v. Phoenix Ins.	
Gray's Exrs. v. Brown	322	Co.	360
Grayson's Appeal	330, 331	Guaranty Co. of N. A. v.	
Green v. Blunt	349, 350	Geddes	12
Green v. Cresswell	100	Guaranty Co. of N. A. v.	
Green v. Crockett	198, 249	Mechanics, etc. Co.	124, 293
Green v. Estes	103	Guaranty Co. of N. A. v.	
Green v. Hadfield	100	Mech. Sav. Bank & Tr. Co. ..	75
Green v. Hughes	408	Guaranty Co. of N. A. v.	
Green v. Kindy	63	Trust Co.	124, 290
Green v. Lake	328	Guard v. Stevens	135
Green v. Milbank	227	Guard v. Whiteside	340
Green v. Wynn	185, 341	Guardian, etc. Co. v. Thomp-	
Green v. Young	283	son	69
Greenberg v. People	366, 368	Gudtuer v. Kilpatrick	399
Greene v. Ferrie	180	Guggenheim v. Rosenfeld	273
Greene v. Slarnes	158, 245	Guild v. Butler	
Greene Co. v. Wilhite	62	14, 274, 315, 319, 344	
Greenfield v. Wilson	368	Guild v. Conrad	100
Greenfield Sav. Bank v. Stowell		Guild v. Thomas	60
199, 294, 298		Gumble v. Jordan	438
Greenway v. Orthwein Grain		Gumels v. Stewart	91
Co.	311	Gump v. Halberstadt	93
Greenwood v. Francis	222, 323	Gumz v. Giegling	354
Greer v. Wintersmith	159	Gunnis v. Weigley	27
Gregg v. Currier	430	Guterson v. Meyer	384
Gregory v. Murrell	232	Guthrie v. Fid. & Dep. Co. ..	75
Greiswold v. Hazels	120	Guthrie v. Ray	188
Gresham v. Peterson	423	Guy v. Lieberenz	17
Gresham v. Ware	247	Gwyn v. Patterson	59
Grice v. Ricks	146, 256		

References are to Pages.

Hackett v. First Nat. Bank of Louisville	299	Hand Mfg. Co. v. Marks	308
Hackfield & Co. v. Metcalf ..	17	Haney & Campbell Co. v. Ad-za Creamery Co.	340
Habenicht v. Rawls	31	Hangsleben v. People	420
Haddock, Blanchard & Co. v. Haddock	212	Hanley v. Stapleton's Adm'r ..	80
Haden v. Brown	241	Hannay v. Moody	26
Hagar v. Mounts	76	Hannay v. Pell	245
Hagerty v. Phillips	210	Hanner v. Douglass	190, 422
Hagey v. Hill	336	Hanson v. Crowley	297
Hailey v. Boyd	446	Hanson v. Donkersley	20, 95
Haines v. Dennett	297	Hantchett v. Pegram	165
Hakes v. Hotchkiss	26	Harbeck v. Vanderbilt	195
Hale v. Boardman	99	Harbord v. Cooper	152
Hale v. Wetmore	245	Harburg v. Krumpf	328, 329
Hall v. Bardwell	329	Harburg India Rubber Comb. Co. v. Martin	95, 98
Hall v. Capital Bank	319-331	Hardcastle v. Comm. Bank ..	197
Hall v. Cole	203	Harding v. Kuessner	401
Hall v. Cresswell	165	Harding v. Tift	265, 266, 267
Hall v. Cushman	233	Hardwick v. Wright	349
Hall v. Cushing	426	Hare v. Grant	358
Hall v. Hall	245, 162	Harger v. Spofford	388
Hall v. Hoxsey	312, 349	Hargraves v. Cooke	113
Hall v. Huffam	280	Hargreaves v. Parsons	88, 102
Hall v. Johnson	332	Hargreave v. Smee	121, 122, 130, 134
Hall v. Johnston	267	Harker v. Irick	429
Hall v. Jones	15	Harker v. Moore	179
Hall v. Livingston	407	Harlan Co. v. Whitney	104
Hall v. Parker	57, 58	Harland Co. v. Whitney	250
Hall v. Peyser	295	Harley v. Stapleton	164
Hall v. Presnell	320	Harmon v. Hale	354
Hall v. Robinson	231, 232, 237	Harner v. Batdorf	265
Hall v. Smith	60, 157	Harner v. Dipple	33
Hall v. Soule	112	Harnsberger v. Yancey	209
Hall v. Weaver	4, 45	Harper v. Kemble	197
Hallettsville v. Long	381	Harper v. Nat. Life Ins. Co.	305
Halliday v. Hart	329	Harper v. Hosenberger	197
Hallock v. Yankey	314, 339	Harpold v. Stobart	20
Halsey v. Fline	397	Harrah v. Jacobs	162, 194
Halstead v. Brown	239	Harrington v. Brown	397
Halsted v. Francis	96	Harris v. Brooks	219, 354
Ham v. Greve	68, 399	Harris v. Carmody	78
Ham v. Hill	172, 172	Harriss v. Fawcett	281
Hamblin v. McAllister	243	Harris v. Hanson	368
Hamburg Bank v. Johnson ..	41	Harris v. Jones	211, 212
Hamer v. Sidway	23	Harris v. Newell	3, 4, 239, 240, 244, 245, 311, 312
Hamilton v. Brewster	405	Harris v. Lindsay	15
Hamilton v. Dunkle	417	Harris v. State	418
Hamilton v. Hooper	297	Harris v. Venables	26
Hamilton v. Johnson	157, 212	Harris v. Warner	207, 208, 219
Hamilton v. Prouty	330, 331	Harrisburg v. Guiles	381
Hamilton v. Reynolds	275	Harrisburg S. & L. Assn. v. U. S. Fidelity & Cas. Co.	124
Hamilton v. Watson	67, 68	Harrison v. Board of Super-visors	407
Hamlet v. Dundass	158	Harrison v. Henderson	273
Hammatt v. Wyman	195	Harrison v. Lane	208, 219
Hammer v. Kaufman	370	Harrison v. Lumbermen Co..	69
Hampton v. Levy	348		
Hampton v. Phipps	176, 178, 251, 270		
Hancock v. Hazzard	372		

References are to Pages.

Harrison v. Field	279	Heathley v. Phillips	212
Harrison v. Phillips	233	Heatley v. Thomas	30
Harrison v. Sawtel	100	Heaton v. Eldridge	116
Harrison v. Thackaberry, 280,	334	Heaton v. Hurlbert	151
Harris-Seller Co. v. Bond ...	332	Hech v. Weaver	139
Harsh v. Klepper	297	Hecht v. Weaver	283
Hart v. Minchen	48	Heddin v. Schneblin	102
Hart v. Striebling	442, 447	Hefferon v. Treber	138
Hart v. United States	291	Heffield v. Meadows	
Hart v. Wynne	52	123, 130, 131,	136
Hartley v. Carboy	297	Heinlen v. Beans	401
Hartley v. Colquitt	418	Heisler v. Aultman	179, 180
Hartley v. Sanford	82, 101	Heist v. Tobias	264
Hartley v. Warner	88	Hellams v. Abercrombie ...	245
Hartley Silk Co. v. Berg	5	Hellen v. Crawford	241
Hartman v. Danner	331	Helmer v. Com'l Bank	151
Hartman v. Lancaster First		Helmer v. St. John	225
Nat. Bank	141	Helms v. Kearns	103
Hartwell v. Moss ...	122, 131, 134	Helms v. Wayne Agricultural	
Hartwell v. Smith	208, 209	Co.	63
Hartwell v. Whitman ...	231, 233	Helt v. Smith	98, 100
Harvey, Ex parte	342	Hempstead v. Watkins	240
Harwood v. Johnson	27	Henderson v. Huey	344
Haseltine v. Guild	158	Henderson v. McDuffee	21
Hassinger v. Newman	97	Henderson v. Reilly	48
Hatch v. Attsborough	361	Henderson v. Rice	24
Hatch v. Ferguson	440	Henderson-Achert Co. v. John	
Hatcher v. Hatcher	198, 248	Shillito Co.	251
Hatchett v. Pegram	227	Hendrick v. Whitmore	
Hathaway v. Haskell	287	200, 205, 207	
Hatheway v. Weeks	427	Hendry v. Cartright	61
Hatfield v. Merod	158	Henningsen v. U. S. Fid. &	
Hauck v. Craighead	279	Guar. Co.	185
Havens v. Willis	180	Henry v. Compton	198, 249
Hawes v. Marchant	77	Henry v. Daly	76
Hawes v. Sternheim	398	Henry v. Heeb	298
Hawkins v. Holmes	110	Henry v. Heldmaier	357
Hayden v. Cobot	168	Henry McShane Co. v. Padin.	131
Hayden v. Sample	385	Henry & Co. v. Halter	195
Hayden v. Smith	253	Heppe v. Johnson	375
Hayden v. Thrasher 213, 219,	244	Herbert v. Dumont	341
Hayden v. Weldon	149	Herbert v. Herbert	438
Haydensville Sav. Bank v. Par-		Herbert v. Hobbs	240
sons	240, 337	Herbert v. Lee	69, 70, 290
Hayer v. Comstock	275	Herdinheimer v. Brent	367
Hayes v. Josephi	268	Herffernan v. U. S. Fid. &	
Hayes v. Ward 244, 245, 247,	248	Guar. Co.	261
Hayes v. Wells	324	Herman v. Jeucher	421
Haynes v. Nice	107	Hess v. Hess	236
Hays v. Ford	224	Hessell v. Johnson	60
Hayward v. Fullerton	241	Hessey v. Heitkamp	400
Hazard v. Irwin	76, 78	Hetfield v. Dow	88
Hazard v. Griswold	77	Hevener v. Berry	181
Hazelrigg v. Donaldson	390	Hewins v. Currier	415
Hazelton v. Douglas	441	Hewitson v. Hunt	391
Hazzard v. Nagle	356	Hewitt v. Adams	338
Head v. Levy	369	Hewitt v. Currier	98
Headsburg v. Mulligan	373	Heydock v. Duncan	425
Healey v. Newton	399	Heyman v. Dooley	47, 255
Heard v. Dubuque Co. Bank.	150	Hiatt v. Hiatt	113

References are to Pages.

Hibbard v. Bailey	276	Hoffman v. Fleming	64
Hibbits v. Canada	426	Hoffman v. Johnson	245
Hibbs v. Rue	294	Hogaboom v. Herrick	240, 353
Hichborn v. Fletcher	215, 217	Hogan v. Reynolds	190, 195
Hickham v. Hollingsworth..	312	Hogg v. Am. Credit Indemnity Co.	127
Hickman v. Fargo	58	Hogue v. State	381
Hickman v. McCurdy	167, 201, 218	Hoile v. Bailey	103
Hickok v. Farmers' Bank ..	240	Holbrook v. Bentley	426
Hidden v. Bishop	177	Holbrow v. Wilkins	254
Hier v. Harpster	265, 353	Holcomb v. Fetter	246
Higdon v. Vaughn	387	Holcomb v. Foxworth	387
Higgins v. McPherson	329	Holden v. Curry	440, 442, 446
Higgins v. Wright	252	Holden v. Fletcher	428
High v. Cox	352	Holden v. Strickland	188
Highland v. Anderson	198	Hole v. Harrison	202
Hightower v. Moore	283, 437	Holland v. Johnson	345
Hightower v. Ogletree	241	Hollingsworth v. Atkins	388
Hill v. Am. Sur. Co.	155	Holliday v. Brown	181
Hill v. Burke	398	Holliman v. Carroll	368
Hill v. Harding	225, 278	Hollister v. Davis	271, 273
Hill v. Kelly	189	Hollingsworth v. Pearson ..	197
Hill v. King. 191 192, 196, 197,	236	Holliman v. Rogers	194
Hill v. Manser	189	Hollinsbee v. Ritchie	166
Hill v. More	223, 227	Hollingsworth v. Tomlinson..	336
Hill v. Myers	159	Holm v. Jamieson	65, 149, 355
Hill v. Sherman	243	Holme v. Brunksill ..	138, 294, 310
Hill v. Thomas	410	Holme v. Rhodes	174
Hill v. Sherwood	80	Holmes v. Day	195
Hill v. Wright	157	Holmes v. Knights	100
Hillegas v. Stephenson	211	Holmes v. Mitchell	111
Hilliboe v. Warner	301	Houghton v. Ely	114
Hilton v. Crist	237	Holmes v. Trumper	399
Himrod v. Baugh	271, 273	Holmes v. Weed	168
Hinckley v. Kreitz	209, 210	Holmes v. Willard	37
Hinds v. Ingham	323	Holt v. Bodey. 2, 374, 345, 346,	351
Hine v. Morse	442	Holt v. Dollarhide	103
Hiner v. Newton	272	Holt v. Savings Bank	253
Hinsdill v. Murray	237	Holt Co. v. Scott	364
Hinton v. Obermayer	195	Holthausen v. Kells	283
Historical Co. v. La Vague..	187	Home Bank v. Newton	270
Hitchcock v. Frackleton	336	Home Ins. Co. v. Holway	70, 75, 290
Hitchcock v. Humfrey	134, 254, 256	Home Nat. Bank v. Waterman	17, 18, 95, 322
Hitchman v. Stewart	202	Home Sav. Bank v. Bierstadt	187
Hixton v. Core	370	Home Savings Bank v. Hosie	135
Hobbs v. Middleton	355, 427	Homer v. Savings Bank..	250, 252
Hoboken v. Harrison	365	Hommell v. Gamewell..	171, 172
Hobson v. Pancey	357	Hood v. Hood	425
Hocker v. Woods	445	Hood v. Jones	17
Hodges v. Armstrong	161	Hooks v. Branch Bank	165, 285, 286
Hodges v. Elyton Land Co. .	321	Hooker v. Gooding	141
Hodges v. Smith	339	Hooker v. Russell	93
Hodgkins v. Heaney	100	Hook v. White	79
Hodgson v. Baldwin	213	Hooper v. Hooper....	214, 227, 287
Hodgson v. Hodgson	16, 222	Hoover v. Mowrer	232, 234, 237, 238
Hodgson v. Shaw	177, 188, 189, 190, 191	Hopewell v. Bank	251
Hoell v. Blanchard	430		
Hoey v. Jarman	122		
Hoffman v. Butler	187		

References are to Pages.

Hopewell v. Kerr	165	Huff v. Slife	255
Hopkinson Bank v. Rudy	182, 184	Hughes v. Hughes	408
Hopkins v. Orr	401	Hughes v. Lawson	104
Hoppes v. Hoppes	245, 247	Hughes v. Littlefield	345
Hopson v. Spring Co.	150	Hughes v. Roberts	55
Horan v. People	368	Hughes v. Southern Co.	328
Hormel v. Am. Bonding Co.	124, 261	Hulett v. Soullard	168, 169, 172
Horne v. Bank	91	Hull v. Meyers	163, 165, 211, 226, 235
Horn v. Bray	101	Hull v. Sherwood	190
Hornor v. Lyman	400	Hulme v. Coles	317, 320
Horsfield v. Cost	159	Humbert v. Trinity Church ..	288
Hortsell v. State	416	Humphrey v. Hitt	313
Hosea v. Rowley	337	Humphreys v. Leggett	244
Hotchkiss v. Barnes	123, 130	Hungerford v. O'Brien	140, 141, 255, 350
Hotham v. Stone	190	Hunt v. Adams	4, 300
Houck v. Graham	101, 166, 211, 212, 215	Hunt v. Amidon	156
Hough v. Am. Surety Co.	262	Hunt v. Bridgham	254, 311
Houghtaling v. Ball	117	Hunt v. Chambliss	206
Houghton v. Ely	141	Hunt v. Fid. & Cas. Co.	292, 293
House v. Am. Sur. Co.	309	Hunt v. Insle	440
Houston v. Branch Bank ...	176	Hunt v. Purdy	241
Houston v. Bank of Huntsville	192	Hunt v. Taylor	275
Houston v. Hurley	350	Hunter v. Dickinson	255
Hovey v. Hobson	34	Hunter v. Fitzmaurice	64
Howard v. Brown	239	Huntress v. Patten	79, 142, 144
Howard County v. Hill	124	Hunter v. Robertson	287
Howe v. Buffalo Co.	171	Huntington v. Wellington ..	97, 108
Howe Co. v. Farrington	69, 347, 354	Hurlburt v. Kephart	120
Howe v. Nickels	44, 49, 50, 257	Hurlbut v. State	445
Howe v. Peabody	438	Hurlburt v. Wheeler	431
Howe v. Taggart	26	Huscombe v. Standing	78
Howe v. White	442	Hurt v. Ford	101
Howell v. Anderson	429	Hutcherson v. Pigg	430
Howell v. Cobb	245	Hutchinson Grocer Co. v. Brand	246
Howell v. Field	103	Hutchinson v. Wright	342
Howell v. Harvey	93, 98	Hutchcraft v. Shrout	444
Howell v. Reams	192, 233	Hutton v. Eyre	340
Howell v. Sevier	331	Hutton v. Padgett	113, 114
Howes v. McRae	103	Hyde v. Miller	163
Howland v. Martin	171	Hyde v. Rogers	351
Howle v. Edwards	240, 243	Hyde v. Tracy	213
Hoyle v. Bailey	96	Hyland v. Habich	139, 231
Hoyle v. Hoyle	100	Ide v. Churchill	222, 314, 315, 316
Hoyt v. Tuthill	215	Ide v. Stanton	109, 112
Hubbard v. Davis	240	Iglehart v. State	356
Hubbard v. Elden	368	Ijames v. Gathier	251, 253
Hubbard v. Gurney	2, 3, 335	Illinois Bank v. Sloo	49
Hubbard v. Hart	320	Imel v. Van Deren	391
Hubbard v. Haley	35, 233	Importers Bank v. McGhee ..	250
Hubbard v. Matthews	40	Independent School Dist. v. Hubbard	375, 376
Hubbard v. Ogdén	17	Indiana Bicycle Co. v. Tuttle ..	131
Hubbard v. Pace	312	Indiana, etc. Co. v. Bender ..	7
Huber v. Steiner	116	Ingalls v. Dennett	161, 169
Huddleston v. Francis	286	Ingels v. Sutliff	239, 329
Hudson v. Aman	159, 203	Ingraham v. Strong	89
Huey v. Pinney	245	Ingram v. State	413

References are to Pages.

Inhabitants of Colrain v. Bell	372	Janes v. Scott	145
Inhabitants of Hudson v. Miles	376, 381	Jansen v. Kuenzie	114
Inkster v. First Bank	240	Jarmain v. Algar	89
In re Babcock	319	Jarvis v. Wilson	107
In re Crace, Balfour v. Crace	283	Jasper Co. v. Chenault	384
In re Gerson	276	Jaynes v. Platt	357, 390
In re Fitton	418	Jeffers v. Johnson	173
In re Foye	251	Jeffries v. Lamb	28
In re Neffs Est.	123	Jemison v. Governor	339
In re Pettengill	276	Jenkins v. Clarkson	240, 324, 329
In re Walker	250	Jenkins v. Lemonds	367
Insurance Co. v. Smith	26	Jenkins v. McNeese	351
Interior Woodwork Co. v. Prasser	35, 37	Jenkins v. Wilkinson	141
International Harvester Co. v. Iowa Hardware Co.	385	Jenness v. Black Hawk	360
International Text Book Co. v. McKone	29, 89	Jenness v. Cutler	17, 314, 330
International Trust Co. v. Boardman	12	Jepherson v. Hunt	89, 98
Iona Sav. Bank v. Boynton	32	Jerman v. Stewart	388
Iowa Loan & Trust Co. v. Haller	19	Jessup v. U. S.	365
Irick v. Black	246, 248, 345	Jewell v. Mills	368
Irish v. Cutter	149	Jewett v. Cornforth	159
Iron City Nat. Bank v. Rafferty	5	Johannes v. Youngs	433
Irvine v. Adams	3, 315	Johanson v. Hoff	433
Irvine v. Angus	185	John v. Jones	169, 238
Irvine v. Milbank	340	Johns v. Reardon	17
Irwin v. Webster	23	Johnson v. Bank	94
Isnard v. Torres	299	Johnson v. Belden	192, 197
Issaquah Coal Co. v. U. S. Fid. & Guar. Co.	72, 75	Johnson v. Crane	212
Jack v. Morrison	104	Johnson v. Dodgson	11, 112
Jack v. People	34, 414	Johnson v. Eaton Milling Co.	304
Jacobs, Ex parte	274	Johnson v. Hecker	380
Jackman v. Mitchell	79	Johnson v. Harvey	224, 225
Jacques v. Fackney	188	Johnson v. Hicks	443
Jackson v. Adamson	162	Johnson v. Ivy	268
Jackson v. Boyles	300	Johnson v. Johnson	59, 445
Jackson v. Davis	179	Johnson v. A. Leffler Co.	33
Jackson v. Griswold	355, 357, 378	Johnson v. May	295, 297
Jackson v. Huey	241	Johnson v. Mills	268, 269
Jackson v. Jackson	22, 24	Johnson v. Ramsey	210, 211, 212
Jackson v. Murray	204	Johnson v. Shepard	145
Jackson v. Post	174	Johnson v. State	420
Jackson v. Smith	385	Johnson v. Vaughn	221
Jackson v. Van Deusen	111	Johnson v. Ward	401
Jackson v. Yandes	48	Johnson v. Weatherwax	59, 60
Jacob v. Kirk	109	Johnson v. Whitecote	26
Jacobs, Ex parte	274	Johnson v. Young	350, 351
Jacobson v. Anderson	446	Johnston Harvester Co. v. McLean	62
Jacobson v. Metzger	393	Johnston v. Township of Kimball	57, 58
Jain v. Griffin	141	Jones v. Ashford	144, 146
James v. Day	332, 333	Jones v. Beach	279
Jamieson v. Holm	4	Jones v. Bacon	100
James v. Jacques	188	Jones v. Blanton	227, 444
James v. Patten	111	Jones v. Carchetti	336
		Jones v. Cooper	87, 88
		Jones v. Davids	188, 190
		Jones v. Droneberger	398
		Jones v. French	434
		Jones v. Greenlaw	145
		Jones v. Hawkins	350

References are to Pages.

Jones v. Hayes	375, 444	Keen v. Whittington	398
Jones v. Hobson	430	Keer v. Clark	224
Jones v. Irvine	433	Keesling v. Frazier	100
Jones v. Keer	27	Kehnast v. Dawm	434
Jones v. Kilgore	355	Keiser v. Beam	232
Jones v. Letcher	219	Keith v. Goodwin .. 206, 208,	212
Jones v. Montfort	370	Keith v. Hudson	193
Jones v. Orchard	422	Keithley v. Pitman	103
Jones v. Quinniplack Bank		Kellar v. Williams	205
	251, 252	Keller v. Ashford ... 18, 250,	332
Jones v. Richardson	428	Keller v. Breeler	399
Jones v. Scanland	363	Kelley v. State	375
Jones v. Shelbyville Co.	60	Kelley v. Sproul	227
Jones v. Tinchler	188, 248	Kellogg v. Am. Ins. Co.	306
Jones v. U. S.	376	Kellogg v. Olmstead 328, 329	
Jones v. Ward	322, 337	Kellogg v. Scott	302
Jones v. Whitehead	1	Kellogg v. State	415
Jones Adm'x v. Williams	356	Kellogg v. Stockton 49, 50	
Jordan v. Adams	167	Kelly v. Henderson	417
Jordan v. Dobbins	139, 281	Kelsey v. Hibbs	93
Jordan v. Greensboro Fur-		Kemp v. Finden	169, 217
nace Co.	85, 86	Kemp v. Nat. Bank of the Re-	
Jordan v. Volkenning	408	public	108
Joyce v. Auten	27, 59	Kampner v. Dooley	247
Joyce v. Joyce	163, 165	Kenard v. Bird	196
Joseph v. Smith	94, 100	Kenderick v. Forney	167
Josselyn v. Edwards	188	Kenderick v. O'Neil 333, 340	
Judah v. Mieure	204, 215	Kennaway v. Treleavan	46
Judge of Probate v. Lane	432	Kennedy v. Carpenter	279
Judge of Probate v. Quimby. 438		Kennedy v. Falde	243
Judge of Probate v. Toothaker 442		Kennedy v. Gambling	112
Judson v. Gorkin	151	Kenney v. Henring	33
Jung v. Am. Credit Indemnity		Kenningham v. Bedford	330
Co.	127	Kent v. Silver	44, 51, 65
Junker v. Rush. 163, 165, 192,	196	Kent v. Canter	189
Justices v. Lee	193	Keokuk v. Love 183, 188,	432
Justices v. Willis	448	Keowne v. Love	432
Kaestner v. First Nat. Bank	280	Kester v. Hill	442
Kales v. Heise	315	Ketchum v. Duncan	191
Kahn v. Bledsoe	158	Keyes v. Allen	103
Kallenbach v. Dickinson	287	Kerns v. Chambers	238
Kane v. Cortsey	336	Kernochan v. Murray	231
Kannon v. Neeley	256	Kerr v. Brandon	370
Kansas City, etc. Co. v. Mur-		Kidd v. Hurley	247
phy	63	Kiernan v. Gratz	97
Kansas City Hydraulic Press		Kieth v. Goodwin	297, 301
Brick Co. v. Nat. Sur. Co. ..	155	Kilbride v. Moss	90
Kansas Co. v. Smith	100	Kilby v. Skel	159
Kaspar v. People	444	Killian v. Ashley	
Kastner v. Winstanley	49		25, 27, 148, 150, 255
Kattelman v. Guthrie's Est ..	446	Kimball v. Newell	29, 30
Kay v. Allen	49	Kimball v. Sumner	430
Kay v. Groves	136	Kimball Co. v. Baker ... 120, 303	
Keach v. Hamilton	245, 313	Kimble v. Cummins ... 166, 227	
Kearnes v. Montgomery. 4, 5, 141		Kimmel v. Lowe	192, 236
Kearsley v. Cole	337, 338	Kinnaird v. Baird	163
Keate v. Temple	88	Kinnaird v. Webster	267
Keegan v. Kinnare	403	King v. Aughtry	197
Keel v. Larkin	158	King v. Batterson	49, 52
Keel v. Levy	247	King v. Downey	155

References are to Pages.

King v. Edmiston	107	Knickerbocker Tr. Co. v. Car-	
King v. State	418	taret Steel Co.	180
King v. State Bank	329	Knight v. Hughes	217
King v. Summitt	89, 97	Knox v. Dixon	211
King v. Upton	26	Koch v. Malhorn	142
King County v. Ferry	375, 379	Koehler v. Reinheimer....	35, 37
Kingsbury v. Westfall	310	Koelsch v. Mixer	225, 359
Kinton, Warren & Co. v. Prov-		Koenigsberg v. Lenning	44
idence Tool Co.	20	Koenig v. Steckel	264
Kincheloe v. Holmes	48, 50	Konitzky v. Meyer	358
Kineck v. Parchen	59	Kountze v. Omaha Hotel Co.	396
Kinlock v. Brown	88	Kracht v. Empire State Sur.	
Kindts Appeal	347	Co.	309
Kingmann Co. v. McMaster ..	336	Krafts v. Creighton	161
Kirby v. Landis	320, 352	Kramph v. Hatz	358
Kirby v. Marlborough		Kreamer v. Kreamer ..	427, 433
132, 136, 266		Kreider v. Isenbice	165, 194
Kirby v. Studebaker	257	Kriz v. Peege	32
Kirby v. Taylor	430	Kropidowski v. Pfister & Vo-	
Kirby v. Turner	342	gel Leather Co.	342
Kirkendall v. Hartsock	394	Krone v. Cooper	401
Kirkham v. Marter	87	Kuerner v. Smith	114, 115
Kirksey v. Jones	385	Kuhlman, A. B. Co. v. Cave..	49
Kirschbaum v. Blair	120	Kuhn v. Ogilvie	33
Kissire v. Plunkett-Jarrell		Kurtz v. Adams	23
Grocer Co.	11, 24, 247	Kurtz v. Forqueer	58
Kitchell v. Burns	149	Kurtz v. Stewart	98
Kitchen v. Chapin	32	Kyger v. Sipe	29
Klaman v. Malvin	64	Kyle v. Bostick	330
Klapworth v. Dressler	17	Kynor v. Kynor	182
Klein v. Currier	23	Laabe v. Bernard	218
Klein v. Funk	161	La Bank v. Le Doux	240
Klein v. Kern	141	Lachey v. Boruff	24
Kleinhaus v. Generous	322	Lachman v. Block	49, 50
Kleiser v. Scott	198	Lachsin, etc. v. London, etc.	
Kline v. Raymond	300	Co.	261
Kliner v. DeYoung	99	Lackey v. Steere	264
Klingensmith v. Klingensmith		Lacoste v. Bexar County	360
222, 338		Lacoste v. Splivalo	432, 435
Klopp v. Lebanon Bank ..	188, 198	Lacy v. Kynaston	333-340
Klosterman v. Olcott	47	Lacy v. McNelle	92
Kline v. Raymond	48, 51	Lacy v. Rollins	232
Knouse v. Wise	138	Ladd v. Board	75
Knox v. Kearns	444	Lady Shandois v. Sunson	87
Knepper v. Glenn	446	La Farge v. Halsey	272
Knight v. Waters	400	Lafayette Co. v. Hixon ..	346, 347
Knoxville Nat. Bank v. Clark	299	Laing v. Lee	112, 114
Knotts v. Butler	227, 281	Lake v. Bruton	181, 345
Knight v. Charter	313	Lake v. Hargis	394
Knight v. Whitehead	17	Lake v. Thomas	70
Knickerbocker v. Wilcox ...	35	Lakeman v. Mountstephen ..	88
Knitting Mills v. Guaranty		Lamar v. Lamar	423
Co.	126	Lamb v. Dart	373
Knowles v. Cuddeback	138	Lamb v. Withrow	194
Knight & Jillson Co. v. Cas-		Lambert v. Settler	323
tle	154, 155, 261, 262	Lamberton v. Windom	144
Knight v. Hughes	169	Lambrecht v. State	429
Knox v. Vallandingham	161	Lamm & Co. v. Colcord	273
Knapp v. Swaney	154	Lammon v. Feusier	367
Knighton v. Curry.....	183, 189	Lamorieux v. Hewitt ..	149, 151

References are to Pages.

Lamphire v. State	419	Leffingwell v. Treyer	279
Lambert v. Scheffler	315	Leffoon v. Kerner	275
Lanman v. Nicholas	315	Legate v. Marr.....	401
Lancashire Ins. Co. v. Callahan	290, 361	Leggett v. McClelland	233, 237, 250, 251
Landa v. Heerman	397, 398	Leidigh v. Pribble	365
Landis v. Royer	100	Leitenhauser v. Baumeister	314, 332
Lane v. Doty	287	Lemmert v. Guthrie Bros.	150, 256, 259
Lane v. Levillian	255	Lemmon v. Strong ..	142, 144, 152
Lane v. Mayer	135	Leninger & Metcalf Co. v.	47
Lane v. Owings	340	Wheat	192
Lane v. Stacy	232	Lenoir v. Hunter	192
Lane v. Westmoreland	161	Lent v. Paddleford.....	51, 255
Lang v. Henry	96, 103	Leoat v. Tavel	113
Langan v. Hewitt	40	Leonard v. Vredenburg	22, 23, 24, 92, 112, 114, 115
Langley v. Sanborn	86	Leonberger v. Krueger	304
Langworthy v. McKelvey	410	Leonhart v. Citizens Bank ..	141
Lanler v. Irvine	426	Leper, Graves & Co. v. First Nat. Bank	392
Lansdale's Admrs. v. Cox	201	Leroux v. Brown	116
Lanusse v. Barker	51	Leslie v. Brown	408
Lapham v. Barnett	114	Lethbridge v. Mytton	173
Larson v. Kelly	369	Levi v. Mendell	255
Larson v. Jensen	88	Levy v. Cohen	152
La Rose v. Logansport Bank ..	7, 259, 289, 290	Levy v. Nicholas	419
Lasher v. Williamson	272	Levey v. Wagner	312
Lathrop v. Atwood	172	Lewick v. Norton	356
La Touche v. Pallas	189	Lewin v. Grieg, Jones & Wood ..	105
Latta v. Weis	19	Lewis v. Armstrong	346
Laurie v. Scholefield	134	Lewis v. Brackenridge	415
Lawder v. Lawder	381	Lewis v. Brewster	146, 256
Law v. East India Co.	344	Lewis v. Hoblitzell	144
Lawrence v. McCalmont	25, 43, 54, 121, 122	Lewis v. Howell	32
Lawrence Co. Bank v. Gray ..	194	Lewis v. Hunchman	319
Lawson v. Wright ..	204, 214, 217	Lewis v. Lee County	360
Lawton v. Maner	49	Lewis v. Mills	358
Laysaght v. Walker	46	Lewis v. Palmer	188
Laxton v. Peat	319	Lewis v. State	417
Lazelle v. Miller	14	Lewis v. U. S. Fid. & Guar. Co.	13, 176, 199
Leader v. Mattingly	275	Lichtenthaler v. Thompson	268, 344
Leahy v. Haworth	151	Liddell v. Wiswell	203, 224
Leak v. Covington ..	204, 214, 358	Lidderdale v. Robinson	178, 191, 192, 194, 231, 235
Learned v. Wannemacher ..	109	Lieberman v. Wilmington	288
Leavett v. Canadian Pac. Ry.	176	First Nat. Bank	300
Leary v. Cheshire	232	Light v. Killinger	196
Lee v. Burrell	172	Lightown v. McMyn	276
Lee v. Butler	296	Lighton v. Adkins	188, 190, 192
Lee v. Charmley	368	Lindell v. Brant	202
Lee v. Dick ..	48, 49, 121, 122, 254	Lingle v. Cook	435
Lee v. Forman	204	Linn v. McClelland	215
Lee v. Griffin	182, 248	Lippincott v. Ashfield	103, 104
Lee v. Jones	67, 68, 70	Lipscomb v. Grace	275
Lee v. Newman	103	Lisles v. Rogers	236
Lee v. Rook	174, 244, 246		
Lee v. Stowe	166		
Lee v. Yandell	30		
Lee Co. v. Welsing	62		
Leeds Lumber Co. v. Haworth ..	227		
Leeke v. Hancock	211		

References are to Pages.

Little v. Edwards	97	Louisville, etc. Co. v. Louis-	
Little v. Nabb	113	ville Tr. Co.	149
Littleton v. Richardson	358	Love v. Gibson	358
Liverpool, etc. Co. v. Phoenix		Love v. Rockwell	399
Co.	12	Loving v. Auditor	379
Liverpool Waterworks Co. v.		Low v. Andrews	117
Atkinson	131	Low v. Blodgett	194
Livingston v. Anderson	189	Low v. Smart	232
Livingston v. Fidelity & De-		Lowe v. Beckwith ..	48, 257, 258
posit Co.	13, 72, 124, 126	Lowe v. City of Guthrie	
Livingstone v. Heinemann ..	275		363, 364, 366
Livingston v. Marshall	273	Lowe v. Dixon	202, 203
Livingston v. Superior Court	392	Lowe v. Reddan ..	266, 270, 346
Livingston v. Van Rensselaer		Lowe v. Riley	399
	237, 238	Lowell v. Parker, 277, 356, 357, 377	
Livingston v. Woods	373	Lowenthal v. Coonan	164
Lloyd v. Dimmack	244	Lower v. Buchanan Bank ..	352
Lloyds v. Harper ..	139, 282, 283	Lowndes v. Pinckney	358
Locke v. Homer	172, 173	Lowry v. Adams	
Lockhart v. Roberts	63		49, 53, 120, 123, 128, 258
Locknane v. Emerson	297	Lowry v. Hardwick	161
Loeser v. Alexander	276	Lowry v. State	377
Loew v. Stocker	59	Loyd v. McTeer	414
Loffin v. Cobb	443	Lucas v. Guy	204
Logan v. Mitchell	252	Lucas v. Owens	75
Logan v. Ogden	212	Lucas v. The Governor ..	357, 378
Lombard v. Mayberry	63	Lucas v. White Line Trans-	
Lonergan v. San Antonio Loan		fer Co.	36
& Tr. Co.	124, 125	Ludekens v. Pscherhofer	69
London Assurance Co. v. Bold	131	Ludd v. Chamber of Com-	
London, etc. Bank v. Par-		merce	238
rott	48, 122	Ludgater v. Channell	405
London Gen. Omnibus Co. v.		Ludwick v. Watson	100
Holloway	68, 69, 70, 71	Lumpkin v. Mills	
London Guar. Accident Co. v.			178, 191, 192, 194, 196
Geddes	13, 176, 187	Lumsden v. Leonard	347, 351
London Tramways Co. v. Bai-		Lusk v. Throop	88
ley	174	Lynch v. Hancock	184
Long v. Am. Sur. Co.	308	Lynde v. Bernard	108
Long v. Billings	414	Lynn Co. v. Ferris	64
Long v. Long	448	Lynn, etc. Co. v. Andrews ..	54
Long v. Miller	250, 287	Lyon v. Northrup	356
Long v. Sullivan	400	Lyon v. Osgood	432
Longan v. Taylor	361	Lysaght v. Phillips	342
Long Bros. Grocery Co. v.		Lytle v. Pope	214
U. S. Fid. Co.	260	Macdonald v. Whitfield	211
Longley v. Griggs	212	Mace v. Gaddis	368
Lonsdale v. Brown	26	Mace v. Wells	275
Lookout Co. v. Houston	103	Macey, Henderson & Co. v.	
Loomer v. Wheelwright	16	Heger	76
Loomis v. Fay	346	Macfarland v. Heim	24
Loomis v. Newhall	107	Machado v. Fernandez	227
Looney v. Hughes	372	Mackey v. Cox	433
Loosemore v. Radford....	172, 173	Mackey v. Lauffin	392
Lord v. Staples	172	Mackey v. Smith	88
Lord Haberton v. Bennett ..	16	Macklin v. Northern Bank ..	251
Lorick v. Caldwell	94	Mackreth v. Walmsley	228
Loring v. Bacon	435, 444	Maddox v. Duncan	287
Loughbridge v. Bowland ..	158, 183	Maddox v. Shacklett	382
Louisville Co. v. Welch ..	50, 53	Madgett v. Fleenor	159

References are to Pages.

Madison v. Am. Sanitary Engineering Co.	35, 295	Martin v. Davis	102, 103
Madison Co. v. Johnson	442	Martin v. Ellerbe's Adm'rs. .	167
Magee v. Manhattan L. Ins. Co.	68, 70	Martin v. Frantz	227
Maggs v. Ames	29	Martin v. Hornsby	58
Magruder v. Peter	198	Martin v. Skehan	240
Mahurin v. Pearson	354	Martin v. Marshall ..	207, 211, 219
Main v. Canavan	332	Martin v. Mechanics' Bank .	269
Maingay v. Lewis	332	Martin v. Niagara Falls Paper Co.	37
Mahin v. Bull	358	Martin v. Stubbings	24
Malleable Iron Range Co. v. Pusey	132, 135	Martin v. Taylor	345
Mallory v. Gillett ..83, 92, 93,	98	Martin v. Wright	134
Mallory v. Lyman	141, 255	Martindale v. Brock ..	117, 196, 236
Malone v. Crescent City M. & T. Co.	136	Marx v. Luling, etc. Ass'n ..	52
Malone v. Keener	97	Maryland Fidelity, etc. Co. v. Com.	381
Malone v. Stewart	213	Maryland Fidelity, etc. Co. v. Fleming	382
Maloney v. Nelson	422	Marysville Telephone Co. v. First Nat. Bank	171
Malott v. Goff	173	Mayor, etc. v. Kelley	379
Maltsby v. Carstairs	341	Mason v. Hall	103
Mamerow v. Nat. Lead Co. 122, 132, 257, 258,	259	Mason v. Jouett's Adm'r ...	340
Manary v. Runyon	90	Mason v. Lord	201
Manford v. Frith ..	196, 197, 199	Mason v. Nichols	35
Mange v. Knowles	360	Mason v. Pierron 188, 193, 197, 204, 215,	235
Manley v. Boycott	314	Mason v. Pritchard 122, 131,	133
Manley v. Geagan	105, 106	Mason v. Rice	387
Mann v. Eckford's Exrs.	65	Mason v. Richards	393
Mann v. Yazoo Bank	361	Mason v. Smith	395
Manning v. Gould	397	Masser v. Strickland	356, 378
Manning v. Shotwell	240	Massie v. Mann	184
Manry v. Wexelbaum Co. 7, 47,	51	Massey v. Brown	338
Mansfield v. City of New York	176	Mastaggart v. Watson	75
Manufacturer's Bank v. Follett	300	Master v. Miller	296
Many v. Sizer	401	Mathers v. Halliwell	332
Map v. Sidney	26	Mathews v. Phelps	132
Maquoketa v. Willey ..	348, 350	Mathews v. Switzler	184, 266
March v. Fid. & Dep. Co. ..	12	Mathias v. Morgan	64
March v. Putney	258	Mathis v. People	417
Marchman v. Robertson, Taylor & Co.	66	Matthews v. Aiken	187, 345
Margaretts v. Gregory	352	Matthews v. Employers Liability Assur. Corp.	126
Marion v. Faxon	89	Matthews v. Hall	167
Markland Co. v. Kimmel ..	60	Matthews v. Laurin	244
Marrcon Co. v. Moffert	313	Matthews v. Mauldin	441
Marrow v. White	94	Matthewson v. Stafford Bank.	329
Marryatts v. White	267	Mattingly v. Sutton	182, 170
Marsh v. Griffin	297	Maule v. Bucknell	93, 96
Marsh v. Harrington ..	168, 217	Maure v. Harrison	250
Marsh v. Pike	192, 245	Mauri v. Hefferman	215
Marshall v. De Groot	280	Maxcy v. Bowie	414
Marshall Field & Co. v. Sutherland	353	Maxwell v. Herron	237
Marshall v. Hudson 158, 161, 165,	285	Maxwell v. Jamieson	171
Martha Jane Camp v. Smith,	432	May v. Burk	188
		May v. Williams	101
		May v. Van	227
		Maybury v. Bainton	257
		Mayfield v. Wheeler	49

References are to Pages.

Mayhew v. Crickett..181, 347, 350	McDowell v. Bank 270
Mayer v. Isaac.....122, 133, 134	McDowell v. Burwell 378
Maynard v. Morse 45	McDowell v. Jones 427
Mayor v. Harrison 65	McElhaney v. Gilliland 367
Mayor v. Ruhstadt 48	McElroy v. Buck 112
Mayor, etc. v. Kelly 302	McElroy v. Hatheway 246
Mayor, etc. of Brunswick v. Harvey 363	McFadden v. Hewitt 441
Mayor of Rahway v. Crowell. 375	McGaughy v. Jacoby 429
Mayor v. Sibberns 368	McGee v. Cunningham 32
McAlester v. Irwin 203	McGee v. Leggett 182
McAllister v. Clark 408	McGee v. Lynch 86
McAreavy v. Magril .....14, 15	McGee v. Prouty 205
McArthur v. Martin 188, 191	McGoffin v. Boyle Nat. Bank.. 251
McBride v. Potter-Lovell Co. 201	McGovern v. Rectanus 285
McBroom v. Governor ...165, 285	McGowan Commercial Co. v. Midland Coal Co. ....88, 94
McCallion v. Hibernia Sav. Soc. 401	McGurk v. Huggett 211
McCarter v. Turner 243	McHardy v. Wadsworth..271, 272
McCartney v. Ridgeway 302	McIntosh-Huntington Co. v. Reed 7
McCarty v. Frazer 429	McIntyre v. People 448
McCarty v. Roots 211	McIver v. Richardson 47
McCatchie v. Durham 166	McCamby v. McKnabb 331
McClaughey v. Smith 300	McKecknie v. Ward 290, 311
McCleary v. Menke 446	McKee v. Campbell..169, 207, 208
McCloskey v. Barr 283	McKee v. Griffin 367
McClung v. Beirne 197	McKee v. Needles 26, 44
McClure v. Com. 441	McKee v. Scobee 183
McClure v. Little 296	McKellar v. Bowell 378
McClurg v. Fryer 144	McKellar v. Peck 398
McCole v. Beattie 159, 171	McKenna v. George 168, 200, 203, 218, 225
McCollough v. Eagle Ins. Co. 54	McKenzie v. Farrell 115
McCollum v. Cushing 48, 257	McKenzie v. Nat. Bank 103
McComb v. Kittridge 328	McKenzie v. Ward 69, 320
McConnell v. Brillhart 110	McKenzie v. Wiley 351
McConnel v. Poor .....307, 457	McKim v. Harwood....431, 433
McConnell v. Scott 245, 249	McKinney v. McKnabb 329
McCormack v. O'Bannon 203	McKnight v. Bradley 183
McCormick, etc. Co. v. Fisher 392	McLaren v. Hutchinson 103
McCormick Harvester Co. v. McKee 57, 61	McLaren v. Watson's Exrs... 149
McCormick Harvester Mach. Co. v. Rae 334, 335	McLaughlin v. Bank 356
McCoy v. Lockwood 243	McLaughlin v. Davis 385
McCracken v. Todd 364	McLean v. Buchanan 365
McCrary v. Van Hook 103	McLellan v. Cumberland Bank 340
McCullom v. Hinckley 250, 251, 286	McLemore v. Powell....311, 326
McCune v. Belt.....211, 232, 237	McLennon v. Am. etc. Co.... 369, 370
McDaniels v. Lee 190	McLuckie v. Williams 386
McDavid v. McLean 203	McMahon v. Fawcett 232
McDoal v. Yeomans 144, 149	McMicken v. Com. 356
M'Donald v. Macgruder..208, 211	McMillan v. Bull's Head Bank 67, 45, 183, 254
McDonald v. People 438	McMillen v. Dearhoff 243
McDonald v. Whitfield 210	McMillen v. Terrell 111
McDonald Mfg. Co. v. Moran. 272	McMahon v. Fawcett 200
McDougal v. Calef 49	McMorris v. Herndon 114
McDougal v. Dougherty 192	McMullen v. United States... 298
McDougall v. Walling 250, 320, 322	McMullen v. Winfield Build- ing & Loan Assn. 288

References are to Pages.

McMurray v. Noyes	142	Merserreau v. Lewis	102
McNall v. Burrow	143	Mersman v. Werges	298, 300
McNeale v. Reed	188	Merwin v. Austin	244
McNeil v. Gossard	120	Meserve v. Clark	399
McNeil v. Sanford	206	Messer v. Swan	233
McNeill v. McNeill	197	Metcalfe Co. v. Scott	339
McNaught v. McClaughrey..	25	Methodist Churches v. Baker	356
McNutt v. Mahan	63	Metz v. Todd	18
McPherson v. Meek	157	Metzer v. Burlingame	226
McRady v. Thomas	252	Metzger v. Hubbard 141, 152,	255
McShane v. Howard Bank 291,	361	Meyer v. Barth	356, 438
McShane Co. v. Padin.....	131	Meyer v. Hartman	102
McVean v. Scott	297	Meyers v. U. S.	376
McVicar v. Royce	170, 172	Meyers v. Lane	120
McVeigh v. Banks	348	Meysenburg v. Schlieper	409
McWilliams v. Northfleet ...	444	Mezner v. Spier	141
Mead v. Grigsby	245	Miami Co. Nat. Bank v. Gold-	
Meade v. McDowell	287, 360	berg	49
Meador v. Meador	245	Michael v. Allbright	203
Means v. Hicks	359	Michael v. Insurance Co.	12
Mease v. Wagner	89	Michigan Ins. Co. v. Leaven-	
Mechanics' Savings Bank &		worth	281
Tr. Co. v. Guarantee Co. 73,	124	Michigan Ins. Co. v. Soule	
Mechanics & Traders Bank v.		240, 311, 354	
Seitz Bros.	270	Michigan State Bank v. Hast-	
Mecklenberg Co. v. Beals	372	ings	251
Mecorney v. Stanley	26, 27	Michigan State Bank v. Peck.	
Medlin v. Com.	417	..... 123, 277	
Medsker v. Parker	245	Michigan Steamship Co. v.	
Megalar v. Groves	336	Am. Bonding Co.	309
Meggett v. Baum	319	Midland Tel. Co. v. National	
Meichener v. Springfield, etc.		Tel. Co.	37
Engine Co.	355	Mihalovitch v. Barlass.....	387
Meiswinkle v. Jung	330, 331	Miles v. Driscoll	98
Mellish v. Green	350	Milks v. Rich	97
Melms v. Werdehoff	206	Miller v. Arnold	239, 243
Melville v. Hayden	131, 136	Miller v. Cook	114
Melvin v. Winslow	393	Miller v. Dyer	351
Memphis v. Brown	141	Miller v. Finley	300
Menard v. Scudder	49, 281	Miller v. Gilleland	297
Meniffee v. Clark	324	Miller v. Gillespie	224
Mercantile Bank v. Taylor .	338	Miller v. Hatch	320
Merchant v. O'Rourke	100	Miller v. Miller	197, 245
Merchants & Farmers Bank		Miller v. Parker	407
v. Calmes	136	Miller v. Pitts	359
Merchants Ins. Co. v. Herber	267	Miller v. Rigley	354
Merchants Nat. Bank v.		Miller v. Spain	322
Cole	112, 120, 123	Miller v. Sawyer	231, 232
Merchants Nat. Bank v.		Miller v. Stem	324, 325
Fall	131	Miller v. Stewart	
Mercein v. Andrus	92	119, 294, 301, 302, 379	
Mereden Britannia Co. v. Zing-		Miller v. White	312
sen	91	Miller v. Woodward	165
Merrimac Co. Bank v. Brown	322	Miller v. Ziegler	194
Merrimack Bank v. Parker..	264	Millerd v. Thorn	14, 332
Meridan Co. v. Flory	241	Mills v. Brown	100
Merle v. Wells	131, 133, 134	Mills v. Hyde	200, 204, 227
Merrells v. Phelps	442, 444	Mills v. Williams	62
Merriam v. Stearns	79	Mills' Adm'r v. Talley's Adm'r	432
Merritt v. Duncan	61	Milroy v. Quinn	48, 257

References are to Pages.

Milwaukee v. U. S. Fid. & Guar. Co.	364, 379	Moore v. Wallis	283
Milwaukee County v. Ehlers ..	370, 379	Morgan v. Boyer	131, 136
Milwaukee Theatre Co. v. Fidelity & Cas. Co.	126	Morgan v. Menzies	386
Mims v. McDowell	171	Morgan v. Smith	339
Miners Ditch Co. v. Zellerbach ..	35, 36	Morgan v. Thompson	324, 331
Mine & Smelter Supply Co. v. Stockgrowers' Bank	93, 94	Morgan Co. Commissioners v. Branham	308
Mines v. Sculthorpe	87	Morin v. Martz	102
Mingres v. Daugherty	312	Moriss v. Ham	189
Minick v. Huff	100	Morley v. Matamora.....	361, 377
Missouri Bank v. Matson.....	351	Morrill v. Morrill	250
Mitchell v. Toole	356, 357	Morris v. Evans	195
Mitchell v. Griffin	100	Morris, Ex parte	251
Mitchell v. Hydraulic, etc. Co. 35		Morris v. Gaines	103
Mitchell v. Shurt	400	Morris v. Morris	436
Mitchell v. Williams	446	Morris Canal Co. v. Van Vorst	264
Mix v. Vail	407	Morris & Co. v. Lucker	276
Mizell v. Burnett	111	Morrison v. Berkey	171
Moakley v. Riggs	146	Morrison v. Citizens' Bank...	240, 248, 311, 313, 351
Moale v. Buchanan	109	Morrison v. Hartman	351
Mock v. Market St. Nat. Bank	276	Morrison & Co. v. Hogue	96
Model Mill Co. v. Fidelity, etc. Co.	72	Morrison v. Paige	163
Moffett v. Roche	16	Morrison v. Poyntz	204, 213, 237, 245
Moies v. Bird	25	Morrison v. Taylor	221
Monmouth, etc., Bank v. Whitman ..	323	Morrow v. U. S. Mortgage Co.	183
Monongahela Coal Co. v. Fid. & Dep. Co.	126	Morrow v. Wood	379
Monsell v. Egen	405	Morse v. Hodsdon	392
Monson v. Drakeley	206	Morse v. Williams	189
Montgomery v. Dillingham ..	360	Morse v. Massachusetts Nat. Bank ..	107
Montgomery v. Hamilton	323	Morton v. Hall	165
Montgomery v. Kellogg	49, 257, 258	Morton v. Marshall	47
Montgomery v. Russell	164	Morton v. Roberts	335
Montgomery Bank v. Walker ..	319	Mosby v. Arkansas	63
Montgomery Co. v. Auchey ..	23	Mosely v. Fullerton	204
Montgomery R. Co. v. Hurst ..	300	Moses v. Lawrence Co. Bank ..	22, 23, 115
Montpelier Bank v. Dixon.....	351	Moses v. Murgatroyd	345
Monumental Nat. Bank v. Globe ..	36	Moses v. U. S.	365, 377
Mooney v. People	414	Mosier v. Wafel	146
Moore v. Alexander	446	Mosley v. Fullerton	221
Moore v. Boudinot	216, 375	Mosley v. Tinkler	47
Moore v. Bray	232	Moss v. Pettngill.....	346, 349, 351
Moore v. Campbell	188	Motes v. Robertson	187
Moore v. Cushing	211	Mottley v. Wyckoff	333
Moore v. Earl	428	Mott v. Maris	192
Moore v. Isley	200, 223	Morrison v. Marvin	190
Moore v. Moberly	234	Moulton v. Posten.....	315, 326, 330
Moore v. Moore	200, 234	Mound v. Barker	78, 79
Moore v. Paine	322	Mount Sterling Improvement Co. v. Cockrell	351
Moore v. Stovall	103	Mowbray v. State	283
Moore v. Topliff	244	Mozingo v. Ross	287
Moore v. Valda	423	Mudge v. Sup. Court Indep. Order of Foresters	65
		Mugge v. Ewing	158
		Muir v. Crawford	341
		Muldoon v. Crawford	192

References are to Pages.

Mullen v. Morris	59, 60	Nat. Citizens Bank v. Toplitz	334
Mulford v. Estudillo	350	Nat. Mech. Banking Assn. v. Conkling	302, 303
Mullen v. Scott	377	Nat. Mahaiwe Bank v. Peck..	269
Mullendore v. Wertz	21, 331, 333, 340	Nat. Bank of Newberg v. Smith	269
Mueller v. Barge	232, 234	Nat. Park Bank v. Taylor....	342
Mueller v. Dobschuetz	320, 338, 341, 342, 343	Nat. Surety Co. v. Long	254, 261
Mueller v. Kelly	400	Nat. Surety Co. v. Morris....	436
Mulvaney v. Gross	103	Nat. Surety Co. v. State Savings Bank	198
Mumford v. Railroad Co.	302, 303	Nat. Surety Co. v. U. S.	379
Munden v. Bailey	231	Nat. Sur. Co. v. Walker....	351
Mundorff v. Singer	347	Naugle v. State	442
Munroe v. De Forest	346	Neagle v. Kelly	103
Munroe v. Hill	255	Neal v. Buffington	182, 245, 246
Munroe v. Powers	419	Neal v. Nash	163
Murdock v. Brooks	398	Nebergall v. Tyree	371
Murray v. Catlett	188	Neely v. Bee	228, 232, 237
Murray v. Graham	296	Neel v. Harding	21, 333
Murray v. Marshall	17, 18, 315, 332	Neff v. Horner	295, 296, 297
Murray v. Meade	189, 197	Neff's Appeal	347
Museum of Fine Arts v. Am. Bonding Co.	308	Neff's Estate, In re	123
Musgrave v. Dickson	179, 182	Neilson v. Fry	204
Mussey v. Rayner	133, 257	Neilson v. Sanborn	114
Mutual, etc. Assn. v. Lichtenwalner	144	Nelson v. Anderson	401
Mutual Life Ins. Co. v. Davis.	313	Nelson v. Bank	285
Mutual Life Ins. Co. v. Smith	26	Nelson v. Boynton	82, 83, 88, 93, 98, 99, 115
Mutual Loan Assn. Fund v. Sudlow	350	Nelson v. Flagg	328
Muzzy v. Shattuck	372	Nelson v. First Nat. Bank of Killingley	284
Myer v. Graffin	88	Nelson v. Fry	226
Myers v. Bank	330	Nelson v. McDonald	62
Myers v. Edge	284	Nelson v. Munch	344
Myers v. Yaple	198	Nelson v. Richardson	91, 115
Myrick v. Hasey	151	Nelson v. Webster	192, 193
Nabb v. Kootz	30, 114, 115	Nelson v. Williams	351
Nading v. McGregor	4, 45, 47, 48, 51, 255	Nelson v. Woodbury	431
Nance v. Oakley	430, 445	Neptune Ins. Co. v. Dorsey..	182
Nash v. Burchard	158, 246, 249	Nesbit v. Albert	62
Nash v. Fugate	61	Nesbit v. Smith	314
Nash v. People	369	Neville's Case	341
Napello Co. v. Bingham....	375	Neville v. Woodburn	437
Nat. Ass'n. v. Lichtenwalner.	145	Newark v. Stout	289, 290
Nat. Bank v. Cushing	188	Newbern v. Dawson	190
Nat. Bank v. Equitable Trust Co.	70, 71, 74	New Bedford Sav. Inst. v. Fairhaven Bank	251
Nat. Bank v. Fidelity & Cas. Co.	66, 262, 290	Newcomb v. Gibson	169, 217
Nat. Bank v. Thomas	135	Newcomb v. Hale	242
Nat. Eagle Bank v. Hunt....	281	Newcomb v. Raynor	343
Nat. Exchange Bank v. Lester	299	Newcomb v. Worster	397
Nat. Exchange Bank v. Cumberlandland Co.	31	New Hampshire Sav. Bank v. Colcord	323, 336, 344, 347
Nat. Exchange Bank v. Gay..	122	Newland v. Harrington	297
Nat. Exchange Bank v. Silliman	181, 185	Newman v. Kaufman	350
		Newman v. King	296, 298
		Newman v. Streator Co.	48, 50
		New Times Pub. Co. v. Doolittle	6

References are to Pages.

Newton v. Charlton	345	Nugent v. Wolfe	82, 101
Newton v. Cox	426	Nurre v. Chittenden	212
Newton Wagon Co. v. Diers..	257	Oak v. Dustin	78
New York, etc. Ins. Co. v.		Oakley v. Pascheller	14, 15
Bennett	40	Oaks v. Weller	49, 54
New York Exchange Bank v.		O'Brien v. Karing	228
Jones	348	Oberndorff v. Union Bank, 326,	329
New York Life Ins. Co. v.		O'Brien v. Cary	399
Casey	19, 336	O'Carroll's Case	156
New York Fidelity Co. v.		O'Connor v. Morse	268
Bickhoff	13	Odlin v. Greenleaf ..161, 204,	227
Niblack v. Champney	330	O'Donnell v. Leeman	109
Nichols v. Burch	350	Oelrichs v. Spain	410
Nichols v. Chittenden ...	388, 389	Offley v. Johnson	249
Nichols v. Johnson	109	Offord v. Davis ....23, 139,	281
Nichols v. McDowell	239	O'Hanlon v. Scott	58
Nichols v. Palmer	310	Ohio v. Blake	286
Nicolls v. Ingersoll	412	Ohio Life Ins. Co. v. Reeder	250
Niemcewicz v. Gahn ....16,	247	Oldenberg v. Dorsey	94
Nisbet v. Smith	244, 246	Oldershaw v. King ....25, 26,	46
Nicholson v. Revell	338	Oldham v. Collins	430
Nicholson v. Paget	119, 136	Olds v. The State	363
Nickerbocker Tr. Co. v. Car-		Olds Wagon Works v. Bank..	267
taret Steel Co.	197	Oliphant v. Patterson	102
Nightingale v. McGinnis	331	Olmstead v. Greeley	103
Nixon v. Beard	171, 218	Olmstead v. Olmstead	279
Noble v. Arnold	410	Omaha Hotel Co. v. Kountze	
Noble v. Himeo	368	.....395, 396, 403	
Nockles v. Eggspieler	387	Omaha Nat. Bank v. Johnson	
Norman v. Olney	434	.....2, 6	
Norris v. Spencer	6	Omaha Nat. Bank v. Walker	151
North Ave. Sav. Bank v.		Oneida v. Thompson	371
Hayes	346, 347	Ontario Bank v. Walker	190
North British Ins. Co. v.		Opp v. Ward, 180, 182, 209, 396,	402
Lloyd	68	Ordeman v. Lawson	114
North v. Robinson	102	Ordinary v. Cooley	426
Northern Assurance Co. v. Bor-		Ordinary v. Heishon	447
gelt	126, 285	Ordinary v. Thatcher	60
Northern Bank v. Farmers'		Orem v. Wrightson, 179, 192, 199	
Bank	265	Oriental Financial Corpora-	
Northern Bank v. Cooke...265		tion v. Overend ....314, 321	
Northern State Bank v. Bell-		Orme v. Young	254
amy	4, 7, 317, 318	Orr v. Mortgage Co.	34
Northern Pac. R. Co. v. Owens	373	Osborn v. Cunningham ..160,	421
Northwestern Nat. Bank v.		Osborn v. Hall	296
Opera House Co.	165	Osborne v. Baker	102, 114
Norton v. Ashbee	428	Osborne v. Bryce	272
Norton v. Coons	206, 219	Osborne v. Cooper	33
Norton v. Eastman	49	Osborne v. Crobern	278
Norton v. Hall	166, 227	Osborne v. Gullikson	141
Norton v. Reed	245	Osborne v. Harper	159
Norton v. Soule	188, 192	Osborne v. Lawson	141
Norwood v. Norwood	192	Osborne v. Noble	251, 252
Nottingham Build & Loan Co.		Osborne v. Robbins	77, 78
v. Thurstan	197	Osgood v. Miller	342
Nottingham Hide Co. v. Bott-		Other v. Iveson	279
rill	134	Otis v. Haseltine	115
Nourse v. Pape	79	Ottawa Bank v. Dudgeon...185	
Noyes v. Humphries	107	Overend Gurney & Co. v. Ori-	
Noyes v. Nichols	49	ental Financial Corporation	327

References are to Pages.

Overton Co. v. Copeland	373	Parker v. Bradley	58
Overton v. Woodson	160	Parker v. Dillingham	100
Ovington v. Smith	407	Parker v. Ellis	202
Owen v. Homan	341, 342	Parker v. Medsker	442, 444
Owen v. Long	33	Parker v. Mercer	184
Owen v. McGehee	170, 218	Parker v. Nations	351
Owen v. State	313	Parker v. Parker	24
Owen v. Udall	57	Parker v. Pitts	79
Owens v. Dickinson	30	Parker v. Sterling	417
Owens v. Mynatt	77	Parmalee v. Lawrence	343
Owens v. Teague	298, 300	Parr v. State	446
Owings v. Owings	167	Parrish v. Gray	243
Oxford Bank v. Haynes	256	Parrott v. Chestertown Bank	182
Oxley v. Young	46	Parrott v. Kane	399
Pace v. Pace	193, 236	Parry v. Spikes	114
Pacewalk v. Bollman	356, 378	Parsons v. Gloucester Bank	342
Pacific Fire Ins. Co. v. Pac. Sur Co.	260	Parsons v. Harrold	21, 330, 333
Pacific Elevator Co. v. Whitebeck	20	Parsons v. McLane	32
Pacific Fire Ins. Co. v. Pac. Sur. Co.	289, 292	Parsons v. Briddock	188, 191, 209, 415, 421, 422
Pacific Guano Co. v. Anglin	247	Partee v. Mathews	163, 227
Pacific Nat. Bank v. Mixter	389, 390	Partridge v. Davis	150, 151
Packard v. Richardson	113	Pashby v. Mandigo	213
Packer v. Benton	91	Paskusz v. Bodner	135
Paddleford v. State	224	Pasley v. Freeman	108
Paddleford v. Thatcher	337	Pass v. Grenada	214
Paff v. Cummings	105	Patterson v. Cave	29
Pafford v. Webb	26	Patterson v. Clark	186, 196
Page v. Ellsworth	19	Patterson v. Gibson	77, 78
Page v. Krekey	75, 76, 295, 306	Patterson v. McNeeley	295
Page v. Webster	240	Patterson v. Neely	297
Page v. White Sewing Mach. Co.	7	Patterson v. Reed	49
Pahlman v. Taylor	297	Patton v. Caldwell	356
Paige v. Parker	258	Patton v. Carr	248
Pain v. Packard, 240, 242, 243, 244	244	Patton v. Mills	102
Paine v. Voorhees	334, 336	Patrick v. Smith	32
Painter v. Mauldin	441	Paul v. Christie	274
Pait v. McCutchen	393	Paulin v. Kaighn	237
Palatine Ins. Co. v. Crittenden	68, 69	Paul v. Ryder	211
Palmer v. Bragg	277	Paul v. Stackhouse	91, 115
Palmer v. Foley	384	Paul v. Murray	24
Palmer v. Grant	148	Pavarini v. Title Guar. Co.	246
Palmer v. Oakley	440	Pawling v. United States	60
Palmer v. White	335	Payne v. Ives	48
Palmeter v. Carey	17	Paynes v. State	417
Pardee v. Markle	267	Paxton v. State	360, 361
Pargond v. Morgan	409	Peacock v. State	417
Parham v. Green	204, 232	Pearl v. Deacon	185, 344, 346
Parham Sewing Machine Co. v. Brock	277	Pearsall Mfg. Co. v. Jeffreys	7, 46, 49, 52, 255
Parish v. Rosebud Co.	7	Pearson v. Daley	443
Parkhurst v. Vail	23, 115	Pearson v. Duckham	204
Parker v. Benton	94	Pendelbury v. Walker	218
Parker v. Bidwell	412	Penderey v. Allen	250
		Pendergast v. Davey	320
		Penn v. Hamlett	63
		Penn v. Ingles	245, 248
		Pennington v. Seal	158
		Pennsylvania Coal Co. v. Blake	25, 26

References are to Pages.

Penny v. Crane	311	People v. Robb	418
People v. Anthony	176	People v. Roose	124
People v. Backus	379	People v. Schuyler	368
People v. Banhagel	307	People v. Seelye	442, 447
Peoples' Bank v. LeGrand ..	269, 270	People v. Slocum	363
Peoples' Bank v. Lemarie ..	55	People v. Tomkins	366, 379
Peoples' Bank v. Pearsons...	336	People v. VanNess	365
Pearson v. Parker	159, 171	People v. Vilas	302, 379
Peaslee v. Breed	227	People v. Wardell	364
Peck v. Frink	141, 142, 144	People v. White	436
Peck v. Wilson	393	People v. Whittemore	286
Pecker v. Julius	279	Peoria Rubber Co. v. During	54
Peebles v. Gray	235, 236	Peoples State Bank v. Miller.	232, 233, 234
Peele v. Powell	91, 104	Pepper v. State	64
Peine v. Lewis	273	Perham v. Rynall	286
Peirce v. Higgins	197	Perkins v. Catlin	144
Pelton v. Prescott	298	Perkins v. Kershaw.....	189, 196
Pelzer, Rogers & Co. v. Stead-		Perkins v. Lewis	431
man	266	Perkins Co. v. Miller	364
Pember v. Mathers	246	Perkins v. Moore	433
Pemberton v. Pakes	266	Perkins v. Perkins	430
Pence v. Armstrong	185	Perily v. Muskegon County...	372
Pence v. Gale	345	Perpetual Bldg. & Loan Assn.	
Pence v. Makepeace	433	v. U. S. Fid. & Guar. Co. 74,	263
People v. Bartels	369	Perrine v. Ins. Co.	268
People v. Bartlett	418	Perry v. Miller	185
People v. Bostwick	60	Perry v. Nat. Provincial Bank	
People v. Brown	297	of England	337
People v. Buster	338	Perry v. Yarborough	159
People v. Byron	445	Perryman v. McCall	131, 136
People v. Carey	420	Peters v. Barnhill	171
People v. Carroll	59	Peters v. McWilliams	163
People v. Carpenter	414	Pettengill, In re	276
People v. Chisholm	352	Pettillo, Ex parte	249
People v. Cushney	419	Pettingill v. Pettingill	426
People v. Dennis	414	Pettit v. Mercer	384, 387
People v. Dunlap	433	Petit v. Petit	434
People v. Edwards	364	Petty v. Cooke	265
People ex rel. v. F. & C. Co.		Petty v. Douglass	329
of N. Y.	38	Petty v. Lang	387
People ex rel. Nat. Sur. Co.		Pettygrove v. Hoyt	392
v. Feitner	38	Pettyjohn v. Liebscher	264
People ex rel. v. Rose	38	Pflugger v. Wilshusen	233
People v. Faulkner	373	Phares v. Barbour	349, 350
People v. Barrett	413	Phelps v. Borland	275
People v. Hanan	416	Phelps v. Church. 5,	149, 150, 151
People v. Hathaway	419	Phelps v. Johnson	340
People v. Huffman	427	Phelps v. Sargent	151, 152
People v. Hunter	431	Phoenix Ins. Co. v. Penn	38
People v. Jahr	364	Philadelphia Casualty Co. v.	
People v. Lucas	368	Cannon & Byers Co.	127
People v. Madden	420	Philadelphia Co. v. Little....	248
People v. McHatton	380	Philbrooke v. McEwen....	348, 349
People v. Mersereau	368	Phillips v. Astling	256
People v. Mercantile Credit		Phillips v. Bossard	290
Guarantee Co.	127	Phillips v. Brazier	436
People v. Munroe	398, 418	Phillips v. Dreher Shoe Co....	276
People v. Organ	62	Phillips v. Foxall	289, 290
People v. Petry	420	Phillips v. McGrath	374

References are to Pages.

Phillips v. Preston, 101, 210, 233	Polk v. Gallant .....198, 249
Phillips v. Thompson 253	Polk v. Plummer 364
Philpot v. Briant 320, 326	Polk Printing Co. v. Smedley. 24
Phippsburg v. Dickinson 375	Polkinghorne v. Hendricks.. 331
Phoenix Ins. Co. v. Findley.. 290	Pollock & Co. v. Gantt..... 388
Phoenix Fire Ins. Co. v. Mowatt 418	Pollock v. Wright 192
Phoenix Co. v. Louisville, etc. Co. 142	Pomeroy v. Tanner 315
Phoenix Ins. Co. v. Spooner.. 12	Pond's Admr's v. Warner.... 173
Pico v. Webster 357, 378	Pond v. Dougherty 199
Picot v. Biddles 438	Pool v. Doster 250, 252
Pickard v. Sears 323	Poole v. Cox 382
Pickett v. Bates 162	Poole v. Hintrager 103
Pickersgill v. Lahens ....279, 280	Pooley v. Herradine 2, 3, 331, 314
Pickering v. Day 376	Pooley v. Whitmore 39, 40
Pickering v. Marsh 207	Pope v. Davidson 174
Pickett v. Land 240	Port v. Jackson 172, 173
Pidcock v. Bishop 68	Portage Co. Branch Bank v. Lane 301
Piedmont Guano, etc. Co. v. Morris 5, 141	Porter v. Hule 211
Pierce v. Atwood 344	Porter v. Stanley 376
Pierce v. Garrett .....199, 232	Post v. Doremus 397
Pierce v. Hardee 392	Post v. Losey, 16, 17, 275, 314, 316
Pierce v. Kennedy 256	Posten v. Moulton 324
Pierce v. Kittridge 105	Postmaster-General v. Furber 376
Pierce v. King 392	Postmaster-General v. Norvell 376
Pierce v. Williams 169	Potter v. Gronbeck 152
Pierde v. Holzer 179	Potter v. Titcomb 429
Pierson v. Catlin 192	Potts v. Dulin 203
Pigot's Case 296	Potts v. Nathans ..189, 209, 422
Pike v. Brown .....86, 102	Poultry Producer's Union v. Williams 71
Pike v. Irwin 107	Powell v. Matthis .....201, 202
Pike v. Neal 415	Powell v. Powell .....205, 433
Pillans v. Van Mierop....22, 107	Powell v. Smith 169
Pim v. Downing 445	Powell v. White ...192, 193, 430
Pine County v. Willard..... 375, 376, 381	Power v. Rankin 98
Pinkstaff v. The People 435	Powers v. Bumcratz .. 45, 46, 47
Pinterd v. Davis 240	Powers v. Chabot 399
Pitt v. Purssord 215	Powers v. Clark 137
Pitt v. Swearingen 397	Powers Dry Goods Co. v. Harlan 69
Pittman v. Chisholm ....142, 144	Pownal v. Ferrand ..156, 157, 162
Pittsburg v. Rhodes 267	Prairie State Bank v. U. S. ....180, 181, 307, 346
Pittsburgh, etc. Ry. v. Shaeffer 290, 291	Prairie v. Worth 379, 380
Place v. Taylor 369	Pratt v. Conway 18
Plankinton v. Gorman 344	Pratt v. Gardner 369
Plano Co. v. Burrows 103	Pratt v. Humphrey 102
Plant v. Storey 253	Pratt v. Law 196
Platter v. Green 47, 134, 177	Pratt v. Wright 441
Pledge v. Buss .....344, 345	Prather v. Young 335
Plowman v. Henderson 428	Pray v. Maine 194
Plummer v. Lyman 107	Pray v. Wasdell 398
Plummer v. People 78	Preslar v. Stallworth..... 190, 195, 214, 227, 359
Plunkett v. Davis, etc. Co.. 295	Preston v. Am. Surety Co. ... 406
Poe v. Dixon.....19, 164, 246	Preston v. Garrard 14
Poillon v. Volkenning 408	Preston v. Gould .....194, 211
Polak v. Everett .....294, 323, 344, 345, 346	Preston v. Hull 63

References are to Pages.

Preston v. Huntington		Ramsey v. Whitback	
..... 295, 301, 310		..... 80, 164, 199, 228	
Preston v. Preston	209	Ramsback v. Reimer	227
Price v. Barker..... 337, 338, 341		Ramsbottom v. Lewis	40
Price County Bank v. McKen-		Ramsey v. Lewis	232, 237
zie	344	Rand v. Barrett	188
Price et al. v. Dime Savings		Rand v. Mather	107
Bank	16	Randall v. Carpenter	410
Price v. Horton	167	Randall v. Sackett	279
Pride v. Boyce	192, 245	Randol v. Tatum	268
Priest v. Watson	351	Randolph v. Fleming	336
Prime v. Koehler	98	Ranelaugh v. Hayes	244, 246
Primrose v. Bromley	225	Rankin v. Child	49, 53
Prior v. Williams	279	Rankin v. Collins	204
Pritchard v. Norton	116	Rankin v. Risley	252
Probate Court v. Carr 432, 434		Rapelye v. Bailey 48, 131, 259	
Probate Court v. Eddy	434	Rapp v. Phoenix Ins. Co....	
Probate Court v. Kimball 433		..... 281, 283, 289	
Probate Judge v. Claggett ... 426		Ratcliffe v. Trout	113
Probate Judge v. Couch	434	Rawlings v. State	420
Probate Judge v. Emery	433	Rawson v. Gregory	350
Probate Judge v. Heydock.... 429		Rawson v. Taylor 14, 15, 333	
Probate Judge v. Sulloway..		Rawstone v. Parr	279
..... 427, 429, 438		Ray v. Brenner	274, 311, 312
Produce Exch. Bank v. Beeber-		Ray v. Ray	399
bach	296	Raynor v. Laux	279
Proctor v. Jones	83	Read v. Case	412
Provenchee v. Piper	98	Read v. Cutts	141, 254, 255
Pugh v. Sample	11	Read v. Nash	83
Purdon v. Purdon	189	Readfield v. Shaver	59, 60
Purdy v. Peters	65	Reber v. Gundy	236
Purvis v. Carstaphan	17	Redman v. Aetna Ins. Co. .	293
Pursiful v. Pineville Banking		Redton v. Heath	349
Co.	270	Red Wing Sewer Pipe Co. v.	
Purviance v. Sutherland..... 160, 161		Donnelly	64
Putnam v. Schuyler.... 29, 65, 76		Reed v. Bacon	40
Pybus v. Gibbs	302, 380	Reed v. Emory	199
Pyke v. Searcy	438	Reed v. Evans	113
Quin v. Arnold	387	Reed v. Fidelity, etc. Co.... 126	
Quin v. Hanford	107	Reed v. Holcomb	100
Quillen v. Quigley	240	Reed v. Humphrey	165
Raband v. D'Wolf	24	Reed v. Lukens	12
Rachelman v. Skinner	387	Reed v. Norris	167
Radcliff v. Poundstone	88	Reed v. Paul	173
Rader v. Yeargin	429	Reed v. Samuels	385
Ragdale v. Gresham	105	Reed v. Tierney	328
Ragland v. Justices	448	Reese v. Berrington	
Ragsdale v. Gossett	315	..... 3, 314, 315, 321, 334	
Railton v. Mathews	69	Reese v. U. S. 294, 412, 416, 419	
Railway Wagon Co. v. Mc-		Reeves v. Bell	227
Clure	100	Reeves v. Chambers	273
Rainbolt v. Eddy	299	Reeves v. Isenhour	160
Rainbow v. Juggins	349	Reeves v. Pulliam	165, 227
Rainey v. Yarborough	203	Reeves v. Steele	431
Raleigh Medical Co. v. Laur-		Reg. v. Broome	421
sen	52	Reg. v. Fay	291
Ralston v. Wood	218	Reilly v. Dodge	283
Ramey v. Com. 414, 416		Richter v. Estate of Lieby .. 436	
Ramsay v. People		Rainhart v. Johnson	232
..... 364, 365, 371, 372		Reints v. Uhlenhopp.... 352, 353	

References are to Pages.

Remington v. Fid. & Dep. Co.	261, 293	Riley v. Stallworth	164, 358
Remington Machine Co. v. Kezerte	67	Ringe v. Judson	122, 131, 135, 137
Remsen v. Beekman	240, 241	Ripley Bldg. Co. v. Coors	76
Remsen v. Graves	35, 65, 336	Ripley v. Severance	158
Renfro's Admrs. v. Price	426	Risley v. Brown	278, 279
Renfroe v. Colquitt	367, 374	Ritenour v. Mathews	156, 245
Reno v. Tyson	430	Rittenhouse v. Levering	194
Reynolds v. Douglas	54, 256, 257	Rizer v. Callen	163, 171
Reynolds v. Edney	256, 257	Roach v. Brannon	385
Reynolds v. Hall	380	Robert v. Adams	204
Reynolds v. Ward	329	Roberts v. Am. Bonding Co.	245, 246
Reynolds v. Wheeler	211	Roberts v. Griswold	277
Republica v. Gasler	412	Roberts v. Hawkins	140, 141, 255
Resseter v. Waterman	89, 100	Roberts v. Laughlin	143
Rex v. Porter	421	Roberts v. Masters	146
Rex v. Tomb	420	Roberts v. Miles	352
Rhea v. Gibson	62	Roberts v. Stewart	329, 330
Rhodes v. Morgan	255	Roberts v. Strange	333, 340
Rhodes v. Cousins	423	Roberts v. Woven Wire Mat- tress Co.	24, 44
Rice v. Fidelity & Dep. Co.	12, 72, 157	Robertson v. Trigg	199
Rice v. Hearn	236	Robertson v. Deatherage	205
Rice v. Morris	182, 184	Robbins v. Brooks	273
Rice v. Loomis	138, 310	Robbins v. Robinson	294, 323
Rice v. McCague	123	Robinson v. Boyd	205
Rice v. Morton	352	Robinson's Exrs. v. Kenon's Exrs.	201
Rice v. Rice	358	Robinson v. Gee	16
Rice v. Sanders	173	Robinson v. Gould	77
Rice v. Southgate	158	Robinson v. Hodge	438
Rice v. Wilson	444, 446	Robinson v. Millard	434
Richards v. Com.	285	Robinson v. Affutt	335
Richards v. Griffith	179	Robinson v. Reed	297
Richards v. Market Exch. Nat. Bank	317, 319	Robinson v. Robinson	29, 35
Richardson v. Allen	410	Robinson v. Sherman	169, 189
Richardson v. Horton	279	Rocheford v. Rothschild	45
Richardson v. Merritt	170	Rochelle's Heirs v. Bowers	358
Richardson v. Richardson	396	Rochester City Bank v. Ell- wood	302
Richardson School Fund v. Dean	136	Rochester Sav. Bank v. Chick	323
Richardson v. Washington Bank	180, 184	Rock Island v. Mercer Co.	422
Richeson v. Nat. Bank of Mena	182, 184	Rockville Nat. Bank v. Holt	322, 323, 337, 341, 342
Richmond Co. v. Davis	63	Rodgers v. Maw	170
Richmond, etc. Co. v. Kasey	290	Rodine v. Lytle	377, 378
Richter v. Henningsan	227	Rodman v. Sanders	185, 186
Richter v. Henning	214	Rogers v. Abbott	158
Ricketson v. Giles	157	Rogers v. Emkie	100
Riddle v. Baker	356	Rogers v. Gibbs	287
Riddle v. Thompson	7	Rogers v. State	376
Ried v. Flippen	165	Rollstone Bank v. Carleton	302
Riegelman v. Focht	93	Rolt v. Cosens	27
Rigby v. Norwood	114	Ronehel v. Lofquist	273
Riggins' Exrs. v. Brown	323	Roper v. Cox	69
Riggold v. Newkirk	256	Roper v. Sangamon Lodge	70, 377
Rile v. McCoy	228	Rose v. Douglass Township	62
Riley v. Jarvis	4, 6	Rose v. Wollenberg	101
		Rose v. Winn	426
		Rozer v. Rozer	87

References are to Pages.

Ross v. Espy	101	Salt Springs Nat. Bank v. Sloan	143, 145
Ross v. McKinney	170	Salysers v. Ross	435
Ross v. McLaughlin	442	Sample v. Cochran	315
Ross v. Menefee	162	Sampson v. Swift	89
Rourke v. Mealy	79	Samuel v. Howarth	314
Rouse v. Bradford Banking Co.	14, 332	Sanchez v. Forester	429
Rouse v. Wooten	5, 7, 318	Sanders v. Dodge	429
Rouse v. King	347	Sanders v. Etcherson	51
Roussel v. Mathews	98	Sanders & Fernwick v. Rives	397
Routon v. Lacy	240	Sanders v. Gillespie	101
Rowan v. Sharp's Rifle Co.	2, 16, 295	Sanders v. Hughes	384
Rowe v. Whittier	103	Sanders v. Weelburg	221, 232, 237, 238
Rowell v. Dunwoodie	112	Sanderson v. Aston	290, 295
Rowland v. Stevenson	419	Sanderson v. Jackson	109
Royal Canadian Bank v. Payne ..	16	Sands v. Durham	176
Royal Ins. Co. v. Davis	283	Sanford v. Allen	141, 144
Royse v. Winchester Bank ..	270	Sandford v. Lambert	319
Ruble v. Norman	264	Sandford v. McLean	185, 186
Rubush v. State	416	Sanford v. Norton	256
Rucker v. Robinson	321, 341	San Francisco Sav. Union v. Long	199
Rudolf v. Malone	205, 435	Sangster v. Commonwealth ..	368
Ruff v. Montgomery	359	San Jose Fruit Packing Co. v. Curry	409
Ruffner v. Love	50	Sapp v. Arken	171
Ruggles v. Holden	241	Saratoga Co. Bank v. Pruyn ..	31
Rule v. Anderson	309	Sargent v. Salmond	158
Rupert v. Grant	324	Sargent v. Wallis	443
Ruppe v. Peterson	93	Sartwell v. Humphrey	132
Rushforth, Ex parte	167, 169	Sasser v. Young	240
Russell v. Annable	39	Satterfield v. People	370
Russell v. Bank	32	Saunders v. Taylor	374
Russell v. Clark	119	Saunders v. Wakefield	112
Russell v. Failor	163, 164	Savage v. First Nat. Bank ..	24
Russell v. Fargo	389	Savage v. Putnam	15
Russell v. Freer	58, 59, 60	Savings Fund Soc. v. Lascher ..	17
Russell v. La Roque	173	Sawyer v. Chambers	27
Rutter v. Hall	438	Sawyer v. Fernald	24
Ryan v. First Nat. Bank	296	Sawyer v. Seen	136
Ryan v. Krusor	218	Sawyers v. Baker	197
Ryan v. Morton	302, 308	Saxe v. Saxe	424
Sadler v. Hawkes	26	Sayers v. Cassell	444
Safferty v. People's Saving Bank	427	Sayers v. Ross	208
Sage v. Strong	295	Sayles v. Brown	20
Sage v. Wilcox	26, 86, 113, 141, 255	Sayles v. Sims	207, 209
Sailly v. Elmore	268	Saylors v. Saylors	245
Saint v. Wheeler & Wilson Mfg. Co.	4, 6, 45, 289, 291, 292, 302, 339	Scales v. Cox	243
Salem Mfg. Co. v. Brower ..	258	Scandland v. Settle	176, 336, 346
Salina v. Abbot	189, 190	Schaaber v. Bushong	103, 104
Saline Co. v. Bule	346	Schaafs v. Wentz	93
Saline Co. v. Sappington	23	Schindler v. Muhlheiser	219
Salisbury v. Hale	138	Schill v. Reisdorf	398
Stallings v. Lane	336	Schlager v. Teal	336
Salmon v. Claggett	321	Schlee v. Darrow	442
Salmon Falls Bank v. Leyser ..	172	Schmertz v. Rix	253
		Schmidt v. Coulter	232
		Schmitt v. Henneberry	180
		Schneider v. Wallingford	381

References are to Pages.

Schock v. Miller	339	Shakman v. U. S. Credit Sys-	tem Co. 124, 127
Schoenfeld v. Gaskill	228	Shand v. McCloskey	138
Schoffner v. Foglenan	198	Shannon v. McMullen	343
Schoyl Dist v. Lapping	58	Sharp v. Allgood	60, 64
School Dist. of Kan. City v.		Sharp v. United States	59
Livers	307	Sharpe v. Hunter	387
Schoolfield v. Rudd.....	192, 193	Sharpleigh Hardware Co. v.	
Schott v. Youree	312-393	Wells	14, 15, 242, 333
Schreffler v. Nadelhoffer	119	Shaw v. Loud	166
Schroepell v. Shaw	347, 348	Shayler v. Giddins	329
Schufelt v. Moore	212	Shearer v. Peale	255
Schuster v. Weiss	380	Shed v. Pierce	333, 340
Schuyler v. Sylvester	390	Sheffield v. O'Day	265
Schwartz v. Hayman	122	Sheffield v. Whitfield ..	7, 46, 47
Scotland Co. Nat. Bank v.		Shelby County v. Bragg	288
O'Connell	299	Shelden v. Butler	97
Scott v. Fisher	326, 327	Sheldon v. Williams	347
Scott v. Harris	330	Shelton v. Farmer	215, 227
Scott v. Knox	181	Shelton v. State	372, 374
Scott v. Myatt	122	Shenandoah Nat. Bank v.	
Scott v. Nichols	164, 165	Read	408
Scott v. Saffold	330	Shepard v. Connely	248
Scott v. Scruggs	315	Shepherd v. May	18
Scott v. Timberlake	170	Shepard v. Pebbles	446
Scott v. White	98, 100	Sherman v. Alberts	88
Screven v. Joyner	200	Sherman v. Black	206
Screwman's Assn. v. Smith ..	70	Sherman v. Harbin. 69, 70, 74,	126
Scribner v. Adams	232	Sherman v. Roberts	6
Scroggin v. Holland	272	Sherman v. State	34
Scudder v. Carter	103	Sherman Co. v. Nichols	340
Scudder v. Union Nat. Bank.	117	Sherraden v. Parker	350
Scully v. Kirkpatrick	417	Sherrod v. Dixon	253
Searing v. Berry	197	Sherrod v. Rhodes	202, 211
Sears v. Brink	112	Sherrod v. Woodard	204
Sears v. Laforce	118	Sherwood v. Collier	194, 195
Sears v. Swift & Co.	44	Sherwood v. Dunbar	214
Sears v. Van Dusen	268	Sherwood v. Hill	431
Seattle Co. v. Haley	241	Sherwood v. Stone	102
Seaver v. Bradley	53, 54	Sherwood v. Woodward	214
Seaver v. Phelps	34	Shewell v. Knox	49
Second Bank v. Hill	269	Shievewright v. Archibald...	110
Second Bank v. Poucher	269	Shinn v. Budd	176, 185, 186
Security Co. v. St. Paul Co. .	217	Shinn v. Shinn	196
Security Savings Bank v.		Shippen v. Clapp	349
Smith	354	Shively v. Black	113
Seely v. People	63	Shoemaker v. King.....	96
Seibert v. Queinel	286	Shook v. People	419
Seibert v. Thompson	232, 252	Shook v. Vanmater	100
Sellmeyer v. Schaffer	331	Shore v. Lawrence	4, 6, 7
Simple v. Pink	26	Shores-Mueller Co. v. Knox ..	55
Senecal v. Smith	384, 385	Shreve v. Hankinson	183
Sentinel Co. v. Smith		Shreffler v. Nadelhoffer	121
130, 137, 134, 255, 259		Shuler v. Hummel	328
Sessions v. Jones	60	Shultz v. Carter	192
Seward v. Huntington	251	Shupe v. Galbraith	27
Seymour v. Gregory	401	Shuttlesworth v. Levi	414
Sexton v. Sexton	226	Sibley v. McAllister	165
Shackamaxon Bank v. Yard		Sidwell v. Evans	26
22, 283, 302		Siebeneck v. Anchor Bank ..	336
Shaeffer v. Clendenin ..	232, 233		

References are to Pages.

Sillette v. Wiley	446	Smith v. Com.	380
Silsby v. Frost	103	Smith v. Compton	27, 358
Silvey v. Dowell	221	Smith v. Conrad	232
Simmond v. Cates	185	Smith v. Corege	97
Simmons v. Camp .. 228, 232, 237		Smith v. Crease's Exrs.	334
Simons v. Steele 6, 115, 259		Smith v. Dann	46
Simonson v. Grant	308	Smith v. Day	409
Simpkins v. McKinney	190	Smith v. Delaney 93, 94, 100	
Simpson v. Cook	284	Smith v. Dickinson 149, 228	
Simpson v. Evans	328	Smith v. Eakin	385
Simpson v. Hall	166	Smith v. Easton	105
Simpson v. Manley	134	Smith v. Exchange Bank ... 100	
Simpson v. Nance	104	Smith v. First Nat. Bank .. 248	
Sims v. Wallace	170	Smith v. Freyler	240
Sinall v. Com.	427	Smith v. Gregory	439
Sinclair v. Redington	218	Smith v. Gummere	442
Sinclair v. National Surety		Smith v. Hodson	224
Co. 65, 126, 292, 293		Smith v. Ide	113
Singer v. Troutman	243	Smith v. Irwin	344
Singer Mfg. Co. v. Bennett .. 207		Smith v. Josselyn 69, 70	
Singer Mfg. Co. v. Boyette		Smith v. Lisher	393
302, 305		Smith v. Lloyd	266
Singer Mfg. Co. v. Little 257		Smith v. Loan Association . 268	
Singer Mfg. Co. v. Littler. 6, 7, 45		Smith v. McKee	447
Singer Mfg. Co. v. Reynolds		Smith v. McLeod 181, 351	
298, 359		Smith v. Mason 203, 204, 218, 320	
Singleton v. Hill	110	Smith v. Meyers	11
Singleton v. McQuerry	300	Smith v. Mollieson	
Singleton v. Townsend .. 214, 227		24, 25, 121, 122, 295, 306, 308, 310	
Singley v. Head	29	Smith v. Montgomery .. 277, 284	
Sinnott v. Feilock	391	Smith v. Moore	384
Sioux City Independent School		Smith v. Mott	2
Dist. v. Hubbard	381	Smith v. National Bank 432	
Sigourney v. Wetherell 147		Smith v. Nat. Sur. Co. 182	
Sitgreaves v. Farmers' Bank. 350		Smith v. Osborne 179, 278	
Skillett v. Fletcher 302, 379, 380		Smith v. Patton	368
Skillings v. Marens	343	Smith v. Peoria County 379	
Skipworth v. Hurt	198	Smith v. Pitts	158
Skrainka v. Rohan	215	Smith v. Rice	315
Slack v. Kirk	186	Smith v. Rumsey	
Slanning v. Style	424	15, 95, 197, 213, 235, 236	
Slaughter v. Froman	430	Smith v. Schneider 180, 198	
Sledge v. McLaren	384	Smith v. Shelden	
Sleigh v. Sleigh	166	1, 14, 156, 232, 324	
Sloan v. Gibbes .. 203, 211, 219		Smith v. Starr	152
Sloan v. Wilson	113	Smith v. State	338
Sloman v. Merc. Cr. Guar.		Smith v. Steele	322
Co. 127, 262		Smith v. Story	384, 385
Sloo v. Pool	202, 204	Smith v. Swan	163, 165
Smart v. Smart	103	Smith v. Townsend	17
Smith v. Ala. Life Ins. Co. .. 36		Smith v. Trader's Nat. Bank 347	
Smith v. Anthony	49	Smith v. U. S.	378
Smith v. Bainbridge	257	Smith v. U. S. Express Co. .. 390	
Smith v. Ballentine	280	Smith v. Wells	198
Smith v. Bank	98, 103	Smith v. Wheeler	275
Smith v. Bank of Scotland 69, 289		Smith v. Whiting 391, 392	
Smith v. Bowman	154	Smith v. Winter	323, 342
Smith v. Caldwell	102	Smith v. Woodbury	330
Smith v. Carder	63	Smith Bros. & Co. v. Miller .. 91	
Smith v. Clopton	336	Smith et al. v. Van Wyck ... 136	

References are to Pages.

Snevely v. Ekel	151	Standard Sewing Mach. Co.	
Snider v. Alexander	376	v. Church	50
Snow v. Brown	205	Stanley v. Carey	385, 386
Snyder v. Klick	51	Stanley v. McElrath	168, 171
Snyder v. State	283	Stannard v. Kingsbury	108
Socialistic, etc. Co. v. Hoffman	305	Star Grocer Co. v. Bradford.	59
Sohier v. Loring	321	Star Wagon Co. v. Sweazy ..	141
Solly v. Forbes	340	Starr v. Lyon	384
Somers v. Johnson	232	Stariha v. Greenwood	103
Somersall v. Barneby . 43, 46,	47	State v. Abbott	406
Sommerville v. Marbury	348	State v. Alden's Securities ..	268
Sooy v. State	381	State v. Allen	60, 414, 418
Sorrell v. Jackson	113	State v. Atherton	339
Soule v. Albee	102	State v. Aubrey	416
Souter v. Bank	241, 243	State v. Baker	63, 414
South Berwick v. Huntress ..	62	State v. Bartlett	365
Sothern v. Reed	189	State v. Becker	418
Southall v. Farish	167	State v. Beebe	412
Southern Cotton Oil Co. v.		State v. Benzion	416
Bass	64	State v. Berning	435
Southern Pacific Ry. Co. v.		State v. Blake	165
Staley	396	State v. Blakemore	370
Southern Surety Co. v. Ty-		State v. Boies	402
ler	72, 293	State v. Boring	63
Spann v. Batzell 91, 100,	115	State v. Bowman	59
Sparkman v. Gove	172, 173	State v. Brown	367, 432
Sparks v. Childers	165	State v. Britton	441
Sparks v. Munson	243	State v. Burnham	418
Spaulding v. Susquehanna		State v. Carlton	380
County Bank	248	State v. Chick	378
Spencer v. Almoney	273	State v. Churchill ... 59, 60,	375
Spencer v. Handley	75	State v. Clark	372
Spencer v. Houghton .. 338,	444	State v. Clifford	420
Spencer v. Leland	33	State v. Colerick	356
Spankle v. Huffman	180	State v. Cone	417
Spray v. Rodman	176	State v. Conover	366, 367
Sprigs v. Bank	314	State v. Coste	355
Spring v. George	351	State v. Craig	378
Springer v. Toothaker	351	State v. Creusbauer	425
Sproul v. Lawrence	364	State v. Crosby	418
Spurgeon v. Smith	268	State v. Cunningham	413
Spurlock v. Earles	429	State v. Davis	370
St. Croix Timber Co. v. Jo-		State v. Dennis	444
seph	2, 248	State v. Drury	444
St. Louis v. Davidson 39,	65	State v. Dunn	381
St. Louis Co. v. Security		State v. Emily	414
Bank	312	State v. Fidelity & Dep. Co.	363
St. Louis Third Nat. Bank v.		State v. Fields	444
Owen	302	State v. Findley	34, 297
St. Paul v. Lock	273	State v. Flinn	365
St. Paul Title & Tr. Co. v.		State v. Fortinberry	35
Sabin	123	State v. Gibson	405
Stack v. Beach	210	State v. Gramm	373
Stadt v. Lill	114	State v. Grammar	377
Stage v. Hammond	448	State v. Gregory	429
Stallworth v. Preslar	214	State v. Harney	300, 365
Stamford, etc. Banking Co. v.		State v. Harper	372, 373
Ball	119	State v. Horn	418
Standard Oil Co. v. Hoese 47,	131	State v. Horton	416
		State v. Hull	440, 442, 443

References are to Pages.

State v. Husey ..	365	State Board of Agriculture v.	
State v. Jennings ..	377	Citizens St. Ry. Co.	36
State v. Johnson ..	416	State ex rel. Day v. Holman	
State v. Kehoe ..	212	302,	379
State v. Lingerfelt	412, 420	State ex rel. Patterson v.	
State v. Mahon ..	412	Tittman ..	120
State v. Manhattan Silver		State Nat. Bank v. Hayden.	151
Mining Co.	296	State Treasurer v. Mann	375
State v. McFetridge	363, 374	Steadman v. Guthrie	44, 113
State v. McGonigle ..	62, 297, 378	Stearns v. Hall ..	112
State v. Mellette ..	248, 264	Stebbins v. Smith ..	427
State v. Merrihew	414, 418	Steel v. Dixon	
State v. Middleton ..	376	221, 230, 231, 232, 233,	234
State v. Miller ..	189	Steele v. McKinley ..	115
State v. Moore ..	59, 368, 371, 372	Steele v. Mealing ..	231
State v. Neibling ..	365	Steelman v. Mattix ..	418
State v. Nevin ..	373	Steinhardt v. Leman ..	388
State v. Newton ..	361	Stenhouse v. Davis	197, 198
State v. Odom ..	370	Stephens v. Bank ..	351
State v. Osborn ..	429	Stephens v. Elver	307, 308
State v. Owens ..	371	Stephens v. Meek ..	225
State v. Parker ..	355	Stephens v. Miller ..	400
State v. Peck ..	59	Stephenes v. Monongahela...	319
State v. Pepper ..	62	Stephens v. Shafer ..	357
State v. Purcell ..	364	Stephenson v. Sinclair ..	368
State v. Roberts ..	380	Stephenson v. Taverners	249
State v. Rottaken ..	437	Stern v. People ..	63
State v. Row ..	418	Sterne v. Vincennes Bank..	350
State v. Ruggles ..	432	Stevens v. Carroll ..	355
State v. Rushing ..	381	Stevens v. Gaylord ..	429
State v. Sandy ..	420	Stevens v. Morse ..	195
State v. Saunders ..	420	Stevens v. Tuite ..	394
State v. Scott ..	418, 432	Stevenson v. Hoy ..	41
State v. Shackelford ...	442, 444	Steuart v. State ..	409
State v. Sixth Judicial Dist. .	398	Stewart v. Parker	314, 323
State v. Slauter ..	446	Stewart v. Sharp Co. Bank.	43
State v. Sloane ..	440	Stiffes v. Lemke ..	307
State v. Smith ..	364, 377	Stillings v. Porter ..	398
State v. Sooy ..	76, 365	Stillman v. Northrop ..	152
State v. Stevin ..	448	Stillwell v. Laron ..	315
State v. Sullivan ..	415	Stinson v. Brennan ..	163
State v. Swinney ..	379	Stirewalt v. Martin ..	342
State v. Traphagen ..	417	Stirewalt v. Parker ..	314
State v. Turner ..	423	Stirling v. Forester ..	200
State v. Walsen ..	374	Stockmeyer v. Oertling ..	215
State v. Western Surety Co.	411	Stocking v. Sage ..	86
State v. Wilmer ..	431, 432	Stockton Society v. Giddings	272
State v. Wilsen ..	372, 433	Stockton v. Stockton ..	338
State v. Wood ..	371	Stoddard v. Hibbler ..	120
State v. Woodside ..	356	Stokes v. Hodges ..	21
State v. Young ..	62, 79	Stokes v. People ..	416
State Bank v. Bartle ..	348	Stone v. Buckner ..	203
State Bank v. Brown ..	361	Stone v. Compton	66, 68, 75
State Bank v. Evans ..	60	Stone v. Hammill	
State Bank v. Johnson	361	165, 171, 218, 225	
State Bank v. Knotts ..	285	Stone v. Rockafeller ..	144
State Bank v. Mettler	104	Stone v. Seymour	
State Bank v. Michel ..	346	184, 265, 266, 376	
State Bank v. Robinson	355	Stone v. Walker ..	83, 91
State Bank v. Smith 188, 346,	347	Stone v. White ..	300

References are to Pages.

Stoner v. Keith Co.	382	Swain v. Barber	224
Stoner v. Millikin	63	Swain v. Mason	217
Stoops v. Wittler	355	Swain v. Wall	200, 217
Storms v. Storms	188	Swan v. Hill	396
Story v. Johnson	352	Swan v. Nesmith	102
Storz v. Finklsteln	387	Swan v. State	379
Stothoff v. Dunham	169, 217, 225	Swan v. U. S.	413
Stout v. Ashton	239	Swartz v. First Nat. Bank..	265
Stout v. Fenno	208	Swartz v. Siegel	275
Stout v. Vanse	161, 208	Sweeney v. Lomme	393
Stovall v. Banks	356	Sweet v. Colleton	103
Stovall v. Border Grange Bank	211	Swayne v. Hill	98
Strange v. Lee	128, 284	Swift v. Beers	79
Stratton v. Stone	299	Swift v. Trustees	371
Strause v. Am. Credit, etc. Co.	127	Swire v. Redman	14, 332
Street v. Chicago Co.	244	Swisher v. Deering 52, 54, 55,	122
Strickland v. Vance	32	Swofford Bros. Dry Goods Co. v. Livingston	399
Stringfellow v. Williams	349	Sylvester v. Downer	141, 142
Strong v. Blanchard	168	Syme v. Bunting	370
Strong v. Foster	269, 284	Symmons v. Want	24, 47
Strong v. Grannis	77	Talbot v. Gay	256
Strong v. Sheffield	26, 27	Talbot v. Wilkins	188
Street v. Silver	141	Talcott v. Cogswell	211
Strong v. White	429	Talcott v. Nat. Credit Co. ...	127
Strother's Admr. v. Mitchell's Ex'r	213	Tanner v. Gude	8
Stroud v. Thomas	27, 320, 329	Tanner v. Moore	134
Stubbins v. Mitchell	171	Tapeley v. Goodsell	390
Stull v. Davidson	286	Tapeley v. Marten	70
Stults v. Zahn	397, 398	Tarbell v. Gray	400
Stump v. Rogers	158, 245	Tardy v. Allen	189
Sturgis v. Knapp	384, 409	Tarleton v. Tarleton	358
Sublett v. McKinney 163, 165, 191,	226	Tarr v. Ravenscroft ..	218, 225
Succession of Dinkgrave	167	Tate v. Norton	438
Sullivan v. Cluggage	353	Tatum v. Bonner	255
Sullivan v. Fraternal, etc. Union	73	Tatum v. Morgan	329
Sullivan v. People	365	Taussig v. Reid 48, 53, 122, 132, 135, 155	
Sullivan v. State	382	Tayleur v. Wildin	136, 138
Sullivan v. Williams	64, 389	Taylor v. Am. Freehold Co. .	32
Sully v. Childress	329	Taylor v. Bank of Kentucky .	291
Sumner v. Bachelder	252	Taylor v. Bank of N. S. Wales	294, 345
Summerville v. Marburys' Adm'rs	313	Taylor v. Beck	239
Sun Life Ins. Co. v. U. S. Fid. Co.	306	Taylor v. Farmers Bank 250, 251, 252	
Supervisors v. Bristol	361	Taylor v. Davis	244
Supervisors v. Clark	380	Taylor v. Drake	105
Supervisors of Omro v. Kaime	375	Taylor v. Heriot	158
Supervisors of Richmond Co. v. Wandell	374	Taylor v. Higgins	171
Suppinger v. Gruaz	393	Taylor v. Jeter	307
Supreme Council v. Fidelity & Casualty Co.	71, 361	Taylor v. Johnson	377
Sutherland v. Patterson	136	Taylor Co. v. King ...	57, 61, 365
Sutherland v. Phelps	399, 400	Taylor v. Lohman	311, 354
Sutro v. Bigelow	390	Taylor v. McClurg ..	48, 55, 277
Sutton v. Grey	102	Taylor v. Morrison	231, 237
		Taylor v. Parker	367
		Taylor v. Preston	97
		Taylor v. Reynolds	204
		Taylor v. Ross	113

References are to Pages.

Taylor v. Savage	101, 207	Thurston v. Gardner	336
Taylor v. Shouse	49	Thurston v. Com.	415
Taylor v. Soper	142	Thurston v. James	340
Taylor v. Standard, etc. Co.	305	Tideout Sav. Bank v. Libbey	152, 153
Taylor v. State	363	Tighe v. Morrison	100, 160
Taylor v. Taintor .. 411, 412, 418		Tilford v. James	253
Taylor v. Tarr	188	Tillinghast v. Merrill	372
Taylor v. Weisel	91	Tillinghast v. Nourse	287
Taylor v. Wetmore		Tillotson v. Rose	162
47, 49, 128, 129, 277		Timmons v. Butler-Stevens	242
Taylor v. Wightman	25	Co.	217
Taypley v. Martin	288	Tindall v. Bell	217
Teaff v. Ross	348	Tindall v. Touchberry	94
Teberg v. Swenson	157	Tinsley v. Anderson	192
Templeton v. Shapely	351	Tinsley v. Oliver	156, 192
Templeton v. Bascom 93, 98, 100		True v. Fuller	151
Ten Eyck v. Brown	141	Tischler v. Hofmeier	122, 135
Tenney v. Prince	22	Titcomb v. McAllister	217, 221, 234
Territory v. Carson	379	Title Guar. Co. v. Fulton Bank	72, 73
Teeter v. Pierce	232	Title Guar. Co. v. Nichols ..	72, 293
Tex. Co. v. Griswold	145	Tobias v. Rogers	223, 224
Thalheimer v. Crow	399	Toledo, St. Louis, etc. R. Co.	408
Thayer v. Daniels .. 162, 164, 276		Toles v. Adea	411, 414
Thresher v. Ely	255	Toleston & Stetson Co. v.	131
Thigpen v. Price	245	Barck	232
Thimbleby v. Barron	341	Tolle v. Boeckler	70, 138
Third Bank v. Owen	69	Tolman Co. v. Butt	161
Third Nat. Bank v. Shilds ..	313	Tom v. Goodrich	196
Thomas v. Bleakie .. 59, 60, 61		Tompkins v. Mitchell	32
Thomas v. Burrus	65, 442	Tompkins v. Trippett	397
Thomas v. Cook	100, 208	Tomlin v. Green	348
Thomas v. Croft	26	Toomer v. Dickerson	296
Thomas v. Kinhead	370	Tootle v. Cook	15
Thomas v. Hubbell 358, 378		Tootle v. Elgutter	122
Thomas v. Markmann	358	Toronto Bank v. Hunter	188
Thomas v. Nason	349	Torp v. Gulseth	188, 198
Thomas v. Liebke	159	Toussaint v. Martinnant	156, 160, 174
Thomas v. Stewart	197	Towle v. Towle	356, 408
Thomas v. Wason	350	Town v. Amidown	279
Thomas v. White	440	Town of Point Pleasant v.	64
Thomas v. Woods	146	Greenlee	59, 60
Thompson v. Adams ... 234, 338		Towns v. Kellett	96, 97
Thompson v. Board	373	Townsend v. Long	311
Thompson v. Bowne	240	Townsend v. Riddle	106
Thompson v. Dekum	435	Townsend v. Sumrall	98
Thompson v. Glover 44, 49		Townsend v. White	191, 192, 194, 195
Thopson v. Gray	26	Townsend v. Whitney	
Thompson v. Lack	338, 341	Tracy v. Goodwin	356, 357, 368, 378
Thompson v. Massie	297	Traders' Co. v. Herber	69
Thompson v. McGregor 406		Tradesman's Nat. Bank v. Nat.	302, 305, 306
Thompson v. Robinson 240		Sur. Co.	
Thompson v. Taylor	212	Trammel v. Phileo	438
Thompson v. Watson	243		
Thompson v. Wiber	385		
Thomson v. Palmer 189, 192			
Thorn v. Pinkham	248		
Thorne v. Travelers Ins. Co.	78		
Thornburgh v. Marden	352		
Thornton v. Fitzhugh	433		
Thrall v. Spencer	252		

References are to Pages.

Train v. Gold	356	Tyree v. Parham	169
Train v. Jones	4	Tyus v. De Jarnette	231
Trapp v. Lee	108	Ulster Co. Savings Institution v. Young	120, 124
Travers v. Dorr	18	Union Bank v. Coster's Ex- ecutors.22, 47, 112, 114, 123, 130, 256	
Travelers Ins. Co. v. Stiles..	305	Union Bank v. Edwards	184
The Treasurers v. Bates	360	Union Bank v. Beech	342
Treasurer v. Temples	377	Union Ins. Co. v. U. S. Fid. Co.	59
Trefethen v. Locke	54	Union Bank of Manchester v. Smith	337
Trenholm v. Kloepper.....	90	Union Mut. Life Ins. Co. v. Hanford	15, 18
Trent v. Romberg	400, 402	Union Nat. Bank v. Rich	250
Trentman v. Wiley	387	Union Trust Co. v. Citizens Tr. & Sur. Co.	7, 309
Treweek v. Howard 357, 428, 429, 488		Union Trust Co. v. Hartford. 332	
True v. Fuller	149	Unionville v. Martin	39
Trevathan v. Caldwell	63	United Am. Fire Ins. Co. v. Am. Bonding Co. ..73, 124, 261, 360	
Tricket v. Mandlee	26	United Brethren v. Aiken.439, 438	
Trimble v. Thorne	242	United, etc. Cos. v. Conard.23, 26	
Trinity Parish v. Aetna In- demnity Co.	261	Upham v. Prince	151
Trotter v. Strong	259	Upton v. Archer	63
Truesdell v. Hunter	324	Upton v. Vail	108
Truss v. Miller	196, 226	Urbahn v. Martin	232, 233
Trustees v. Cowden	375	Urich v. St. Louis	409
Trustees of Schools v. Sheik 57, 59		Urquhart v. Brayton	86
Tuck v. Calvert	198	U. S. v. Addison	403
Tuck v. Moses	391, 392	U. S. v. Allsbury	355
Tucker v. Davis	414	U. S. v. Archer's Exrs.	278
Tucker v. Laing	329	U. S. v. Bailey	138
Tuckee Lodge v. Wood	308	U. S. v. Bengdorf	155
Tucker v. Stewart	438	U. S. v. Boeckler	295
Tuckerman v. French	49	U. S. v. Boyd	361, 376, 377
Tudhope v. Potts	447	U. S. v. Bradley	364, 365
Tully v. Lewitz	57	U. S. v. Bryan	372
Turkman v. Duncan	147	U. S. v. Bunker	236
Turnbull v. Trout	115	U. S. v. Cheeseman	380
Turner v. Davis	207, 208	U. S. v. Cushman	4, 279
Turner v. Hubbell	87	U. S. v. Feely	420
Turner v. Killian	368	U. S. v. Hillegas	382
Turner v. McCarter	165	U. S. v. Hodge	336
Turner v. Overall	208	U. S. v. Humason	366, 373
Turner v. Sisson	368	U. S. v. Hunter	199
Turner v. Teague	192	U. S. v. Irving	376
Turner v. Thom	227	U. S. v. January	376
Tuohy v. Wood	335	U. S. v. Kirkpatrick	380
Turrell v. Boynton	315, 330	U. S. v. Maurice	362
Tuthill v. Russell	378	U. S. v. McGlashen	418, 420
Tuton v. Thayer	141	U. S. v. Morris	382
Tuttle v. Bartholomew	151	U. S. v. McMullen	323, 324
Tuttle v. Northrop	442	U. S. v. Merc. Tr. Co.	153
Tweeddale v. Tweeddale 19, 103, 154		U. S. v. Nelson	63
Twiggs v. Augusta Sav. Bank 348, 351		U. S. v. Nickoll	380
Twitty v. Houser	429	U. S. v. Prescott	371, 372
Tyler v. Birmey	149	U. S. v. Price	219, 278
Tyler v. Davis	313		
Tyler Min. Co. v. Last Chance Min. Co.	408		
Tyler v. Waddingham	79, 255		
Tyns v. Jarnette	183		

References are to Pages.

U. S. v. Ryder	421	Vilas v. Jones	331, 337
U. S. v. Simmons	422	Villars v. Palmer	286
U. S. v. Simpson	313, 347	Vinal v. Richardson	256, 257
U. S. v. Spalding	296	Vinyard v. Barnes	392
U. S. v. Thomas	373	Violett v. Patton	113
U. S. v. Tingley	366	Virden v. Ellsworth	255
U. S. v. Wardwell	376	Virginia Bank v. Boisseau..	253
Union Township v. Smith	371, 372	Vivian v. Otis	374, 377
U. S. Co. v. West Va. Co. .	297	Vliet v. Wyckoff	204, 225
U. S. Fid. & Guar. Co. v.		Vogel v. Melms	100
First Nat. Bank	139	Voiles v. Green	300
U. S. Fid. & Guar. Co. v.		Voltz v. Harris	255
Fossati	372	Vons v. State	283
U. S. Fid. & Guar. Co. v.		Voorhies v. Atlee	146
Foster Bank	73, 292, 293	Voris v. Building & Loan	
U. S. Fid. Co. v. Haggart ...	59	Assn.	97
U. S. Fid. & Guar. Co. v.		Vorley v. Barrett	222
Linehan	38	Vorres v. Nussbaum	32
Uzzell v. Mack	179, 197	Voss v. Chamberlain	151
U. S. Fid. & Guar. Co. v.		Voss v. German Bank	269
Overstreet	126	Vose v. Cockcroft	390
U. S. Fid. & Guar. Co. v.		Vose v. Florida R. R. Co.	346, 350
McGinnis	13, 200, 205, 216	Wadsworth v. Allen	55, 277
Vail v. Foster	179	Wagenseller v. Prettyman ..	218
Valentine v. Donahoe	139	Waggener v. Dyer	338
Valentine v. Wheeler	252	Wagner v. Stocking	273
Van Arsdale v. Howard	68	Walles v. Cooper	158
Van Buren County v. Am.		Wain v. Warlters	22
Surety Co.	124, 260	Wainright v. Straw	91
Vance v. Lancaster	169	Wakefield Bank v. Truesdell.	336
Vanderbilt v. Schreyer	142	Wakefield v. Greenhood	107
Vanderford v. Farmers'		Walker v. Dicks	170, 182
Bank	317, 319	Walker v. Ebert	76
Van Derveer v. Wright	147	Walker v. Forbes	
Vandervere v. Ware	193	44, 48, 52, 54, 142, 257	
Vandiver v. Pollak	231	Walker v. Gilbert	76
Vandiver Co. v. Waller	385	Walker v. Goldsmith 16, 142,	311
Van Doren v. Tjader	115	Walker v. Hardman	136
Van Horne v. Everson	159	Walker, In re	250
Van Kuren v. Parmelee ..	287	Walker v. Kennison	391
Vanleer v. Crawford	54	Walker v. Lathrop	165
Van Orden v. Durham	253	Walker v. Leighton	271, 273
Van Patten v. Beals	35	Walker v. McKay	169
Van Patten v. Richardson	203, 217	Walker v. Potilla	431
Van Pelt v. Little	367	Walker v. Richards	88
Van Renneselaer v. Miller ..	255	Walker v. Russell	108
Van Valkenburg v. Patterson	370	Walker v. Sherman	26
Van Wagner v. Territt	92	Walker v. Taylor	100
Van Winkle v. Johnson		Wallace v. Dilley	409
217, 200; 218		Wallace v. Exchange Bank .	302
Van Wirt v. Wilkins	257	Wallace v. Jewell	297, 307
Vanzant v. Arnold	151	Wallace v. Tice	296
Vartie v. Underwood	16, 247	Waller v. Pittman	393
Vary v. Norton	324	Walsh v. Baillie	277
Veal v. Hurt	32	Walsh v. State	445
Veazie v. Carr	315	Walters v. Craft	287
Veazie v. Willis	63	Walton v. Mandeville ..	105, 106
Vermule v. York Cliff Im-		Walton v. Mascall ..	254, 256, 335
provement Co.	161	Waltz v. Parker	329
Vert v. Voss	184	Wanack v. People	356

References are to Pages.

Warburton v. Ralph	314, 315, 324	Watkins v. Perkins	88
Ward v. Bell	396	Watkins v. State	446
Ward v. Churn	59, 60	Watkins v. Worthington	192
Ward v. Hackett	59	Watson v. Perrigo	103
Ward v. Henry	161	Watson v. Poague	265
Ward v. Hood	391, 393	Watson v. Randall	26
Ward v. Johnson	315	Watson v. Read	351
Ward v. Marion County	288	Watson v. Watson	391
Ward v. Nat. Bank	338	Watson v. Wilcox	186
Ward v. School Dist.	371	Watt v. Kinney	197
Ward v. Stahl	366	Wattles v. Hyde	427
Ward v. Tinkham	438	Watts v. Rice	387
Ward v. Whitney	386	Watts v. Shuttlesworth	309
Ward v. Wick	324	Way v. Hearn	222
Ward v. Wilson	255, 257, 259	Way v. Reed	310
Warden v. Ryan	308	Way v. Wright	417
Wardlaw v. Harrison	49	Wayland v. Tucker	181, 203
Ware v. Adams	24	Wayne v. Commercial Bank	69
Ware v. Allen	102	Wayne v. Commonwealth	
Warfel v. Frantz	60	Na. Bank	70, 288
Waring, Ex parte	250	Wayne v. Warlters	112, 113
Waring v. Fletcher	387	Weare v. Sawyer	30, 35
Warner v. Beardsley		Weaver v. Shryock	279
	240, 241, 245, 246	Webb v. Hewitt	341
Warner v. Campbell	336	Webber v. Wilcox	407
Warner v. Morrison		Webbs v. State	357
	163, 201, 205, 206, 215	Webster v. Cobb	150
Warner v. Price	206	Webster v. Lawson	15
Warner v. Willoughby	93, 98, 100	Webster v. Thompson	427
Warren v. Branch Bank	69	Weidner v. Union Sur. Co.	262
Warren v. Crabtree	79	Weikle v. Minneapolis, etc.	
Warren Deposit Bank v. Fidelity & Deposit Co.	74	Ry. Co.	36
Warren v. Powers	433	Weil v. Thomas	247
Warren, Webster Co. v. Beaumont Hotel Co.	154	Weiler v. Henarie	255
Warren v. Wells	273	Weir v. Mead	53
Warrey v. Foest	32	Weir v. People	427
Warring v. Ward	18	Weir Plow Co. v. Walmsley	297
Warrington v. Furber	254, 257	Weisel v. Spence	98, 100
Wartman v. Yost	273	Weeks v. Parsons	101, 210, 211
Washington v. Hunt	433	Weed Co. v. Maxwell	30
Washington v. Norwood	213	Weed Sewing Mach. Co. v.	
Washington v. Taite	245	Oberricht	334, 335
Washington, etc. Co. v. Johnson	19	Weed Sewing Mach. Co. v.	
Washington Ice Co. v. Webster	394	Winchell	7, 123
Wasson v. Hodshire	348	Winchell	123
Waterman v. Clark	271, 272	Welch v. Kukuk	337
Waterman v. Vose	297	Welch v. Parran	184
Waters v. Carroll	370	Welch v. Walsh	255, 256, 257
Waters v. Creagh	352	Weldin v. Porter	112
Waters v. Riley	225, 279, 280, 427	Welfare v. Thompson	315
Watertown Fire Ins. Co. v. Rust	38	Wells v. Child	425
Watertown Fire Ins. Co. v. Simmons	70, 290	Wells v. Davis	47, 258
Watertown Sav. Bank v. Mattoon	70	Wells v. Dill	59, 61
		Wells v. Foster	32
		Wells v. Girling	79
		Wells v. Miller	205, 208
		Wendlandt v. Sohre	
			1, 14, 15, 156, 246
		Wendling v. Taylor	315
		Wertheimer v. Howard	369

References are to Pages.

West v. Belches	232	Whitfield v. Dow	90
West v. Brison	352	Whitford v. Laidler	58
West v. Carter	400	Whiting v. Burke	200, 205
West v. Chasten	244	Whiting v. Clark	285, 286
West v. O'Hara	88	Whiting v. Ohlert	117
Westbrook v. Comstock	440	Whitman v. Gaddie	208
Western Surety Co. v. Kelley	422	Whitman v. Porter	203
Westervelt v. French	319	Whitney v. Groot	47, 131
Westervelt v. Smith	356	Whitney v. Stearns	114
Westhaven v. Olive	356	Whiton v. Mears	256
Westhead v. Spronson	25	Whitridge v. Durkee	245
Weston v. Barton	277, 284	Whittiker v. Kirby	353
Weston v. Empire Assurance Corporation	134	Whitworth v. Tilman	168
Weston v. Sprague	363	Wiedeman v. Crawford	235
Weston v. Wiley	171	Wiel & Bros. v. Thomas	17
Wetherbee v. Colby	393	Wier v. Mead	426
Wetherell v. Joy	265	Wier Plow Co. v. Walmsley	120, 301, 308
Wharton v. Woodburne	3, 161	Wiggins' Appeal	30
Wheat v. Kendall	14	Wilcox v. Daniels	402
Wheatfield v. Brusch Valley	227	Wilcox v. Draper	47, 48
Wheatley v. Calhoun	21, 186	Wilcox v. Fairhaven Bank	182, 184, 221
Wheeler v. Glenn	153	Wild Cat Branch v. Ball	58
Wheeler v. Lewis	145	Wildes v. Savage	43, 44, 256, 257, 258
Wheeler v. Rohrer	7	Wildrip v. Black	191, 194
Wheeler v. State	414, 418	Wilds v. Attix	239
Wheeler v. Traders Deposit Bank	63	Wile v. Koch	398
Wheeler, etc. Co. v. Brown	303	Wiley v. Moor	62
Wheelwright v. DePeyster	16, 247	Wiley v. Robert	109
Whipple v. Stevens	287	Wiley v. Temple	14, 332
Whitaker v. Richards	59, 60	Wilhelm v. Schmidt	267
Whitbeck v. Ramsay's Est.	159, 199	Wilhelm v. Voss	98
Whitcomb v. Whiting	286, 287	Wilkerson v. Crescent Co.	290
White v. Armsby	297	Wilkes v. Vaughan	192
White v. Ault	16	Wilkins v. Carter	49, 50
White v. Banks	201, 231, 234, 238	Wilkins v. Gibson	183
White v. Blake	417	Wilkinson v. Evans	109
White v. Boone	15	Willard v. Eastham	31
White v. Case	146	Willard v. Wood	18, 290
White v. Ditson	430, 431	Williams v. Bacon	110
White v. Duggan	62	Williams v. Banks	158
White v. Hopkins	319	Williams v. Bowman	370
White v. Howland	148	Williams v. Coleman	386
White v. Life Assn.	270	Williams v. Crutcher	63
White v. Life Assn. of America	284	William v. Ewing	227
White v. Middlesex R. Co.	174	Williams v. Granger	141, 255
White v. Miller	162, 171	Williams v. Harrison	445
White v. Moe	432	Williams v. Helme	169, 170, 183
White v. Reed	44	Williams v. Hugunin	31
White v. Rintoul	92, 93, 95	Williams v. Ketchum	114
White v. White	24, 167	Williams v. Leper	94, 99, 100, 104
White v. Woodward	23, 46	Williams v. Marshall	58
White, etc. Co. v. Mullins	303	Williams v. Morton	442
Whitehead v. Peck	164	Williams v. Ogg	243
Whitehouse v. Hanson	206, 211	Williams v. Owen	180, 185
Whitehurst v. Hyman	99	Williams v. Rawlinson	134, 266
Whiteman v. Harriman	232	Williams v. Rogers	103
		Williams v. Smith	337

References are to Pages.

Williams v. State	413, 437	Wittmer v. Elleson ..	315, 330, 334
Williams v. Tipton	158	Wittmer Lumber Co. v. Rice.	7
Williams v. Williams	162, 204, 423	Woffington v. Sparks	190, 245
Williams' Admr's v. William's Admr's	161, 162	Wolcott v. Hagerman	232
Williamson v. Hill	95	Wolf v. Hostetter	211
Williamson v. Woodman ..	441, 442	Wolf v. Madden	354
Williams-Thompson Co. v. Williams	338	Wolff v. Koppel	102
Willingham v. Ohio, etc. Tr. Co.	184	Wolke v. Fleming	103
Willis v. Chowning	285	Wolmershausen v. Gullick ..	200, 213, 218, 224, 225, 249
Willis v. Davis	345	Wolstenholme v. Smith	317
Willis v. Shinn	105	Wolverton v. Davis	101
Willoughby v. Fidelity & Deposit Co.	72, 74, 124, 125	Wood v. Fisk	279
Wills v. Brown	98	Wood v. Leland	227, 283
Wills v. Ross	26, 44	Wood v. Newkirk	328
Wills v. State	414	Wood v. Perry	204, 215
Wilmerding v. McKeeseon	430	Wood v. Priestner ..	122, 133, 136
Wilmington v. Nutt	370	Wood v. Steele	294, 297, 298
Wilmington C. & A. R. Co. v. Ling	70, 289, 290	Wood v. Washburn	58
Winslow v. People	445	Wood v. Wheelock	113
Wilson v. Bevans	103	Woodburn v. Carter	336
Wilson v. Burney	188	Woodcock v. Oxford & W. Ry. Co.	298
Wilson v. Campbell	4	Woodfin v. McNealy	429
Wilson v. Hart	110	Woodman v. Calkins	59
Wilson v. Foote	340	Woods v. Doherty	138
Wilson v. Langford	330	Woods v. State	418, 426
Wilson v. Lloyd	324	Woodstock Bank v. Downer ..	49, 255
Wilson v. Monticello	69	Woodward v. Cleggs	197, 344
Wilson v. Powers	329	Wooldridge v. Norris	244
Wilson v. Ridgely	190	Wooley v. Jennings	134
Wilson v. Rose	428	Woolfolk v. Plant	324
Wilson v. Stanton	211	Woomer v. Waterloo Agr. Works	185
Wilson v. Stewart	232	Woonsocket Inst. v. Ballou..	287
Wilson v. Stilwell	285	Worley v. Cobble	419
Wilson v. Tibbetts	242	Wormleighton & Hunter's Case	201
Wilson v. White	312	Worthen v. Prescott	412
Wilson v. Whitmore	155	Worthy v. Brower	432
Winn v. Hillyer	100	Wray v. People	420
Winn v. Sanford	29, 30	Wren v. Pearce	113, 141
Winne v. Cold Springs Co. ..	335	Wren v. Peel	259
Winnebago Mills v. Travis ..	49, 50	Wright v. Austin	248
Winship v. Bank	40	Wright v. Crump	182
Winship v. Bass	428, 429	Wright v. Dyer	255
Winsor v. Orcutt	385	Wright v. Griffith	44, 51, 134
Winston v. Metcalf	271	Wright v. Grover & Baker Sewing Mach. Co.	192, 235, 236
Winston v. Yeargin	350	Wright v. Harris	62
Winterfield v. Cream City Brewing Co.	37	Wright v. Hunter	203
Wise v. Miller	47	Wright v. Jones	57
Wisecarver v. Wisecarver....	410	Wright v. Keyes	386, 389
Wiseman v. Lynn	392	Wright v. Kneipper	350
Wiswall v. Potts	158	Wright v. Lang	428, 429
Witcher v. Hall	295	Wright v. Morely ..	179, 188, 191
Witherby v. Mann	171	Wright v. Post	202
Withers v. Berry	256	Wright v. Russell	276, 277
		Wright v. Shorter	3, 255
		Wright v. Simpson	311

References are to Pages.

Wright v. Smith	97	York, etc. Co. v. Brooks	63
Wright v. Storrs	342	Yorkshire Ry. Wagon Co. v.	
Wright v. Talbot	199	Maclure	35
Wulff v. Jay	344, 348	Young v. Cleveland	347
Wunderlich v. Chicago, etc.		Young v. Brown	24
Ry. Co.	12	Young v. Dake	117
Wyatt v. Hodson	286	Young v. French	98
Wymann v. Mainegra	438	Young v. Lyons	159
Wyke v. Rogers	336	Young v. People	414
Wyman v. Campbell	434	Young v. Shunk	216
Wyman v. Gray	114	Young v. State	364
Wyman v. Yeomans	297	Young v. Vough	188, 198
Wynn v. Wood	103	Yonge v. Reynell	188, 200
Wynne v. Brooks	169	Zabriskie v. R. R. Co.	65
Wynne v. Governor	63	Zahn v. Lancaster First Nat.	
Wynne v. Hughes	26	Bank	141
Wythes v. Labouchere	69	Zane v. City Tr. Co.	153
Yale v. Dederer	31	Zantzinger v. Weightman	423
Yale v. Edgerton	24	Zapilac v. Zapp	332
Yale v. Wheelock	29, 30	Zerkle v. Price	35
Yancey v. Brown	47	Zellweger v. Caffé	115
Yandle v. Kingsbury	394	Ziegler v. Hallahan 294, 297, 310	
Yarbrough v. Comm.	418	Zimmerman v. Chelsea Sav.	
Yates v. Donaldson	314	" Bank	199
Yexera v. Ruthruff	283, 312	Zimmerman v. Gaumer	196
Yocum v. Smith	299	Zimmerman v. Judah .. 295, 307	
Yeder v. Briggs	160	Zimmerman v. Rate	299
York County v. Watson 373, 374		Zook v. Clyemmer	184

INDEX.

References are to Sections.

A.

ABANDONMENT—

Of rights against principal as consideration for suretyship or guaranty, 17.

Of legal proceedings as consideration for contract of suretyship or guaranty, 17.

Of attachment as breach of bond, 281.

ABATEMENT—

Of replevin action as breach of bond, 286.

ABSENCE—

Of co-surety as affecting contribution, 149.

Of principal under guarantee of collection, 109.

ABSOLUTE GUARANTY—

Nature and definition of, 3, 105.

Notice of acceptance of, 39.

Of payment is, 105.

Examples of, 106.

Demand and notice not necessary before suit on, 184.

Demand and notice under may be expressly stipulated for, 184.

Guarantor under not released by creditor's neglect to enforce collaterals against principal, 224.

Not released by the creditor's passive indulgence, 224.

ABUSE OF PROCESS—

Are sureties on attachment bonds liable for damages as for, 279.

ACCEPTANCE (see Offer and Acceptance)—

Of guarantee, 31 et seq.

ACCEPTANCE OF BILL—

Is oral or oral promise of within Statute of Frauds, 79.

ACCEPTOR—

Is surety who signs as released by extension of time, 226.

ACCIDENT—

Alteration of instrument by does not release surety, 210.

ACCOMMODATION DRAWER—

Cannot have reimbursement if he pays part after release by want of demand and notice, 126.

ACCOMMODATION PAPER—

Parties to as sureties, 5.

Partner has no implied power to bind firm by, 29.

Bona fide holder of firm's may enforce, 29, n. 42.

Contribution and indemnity between parties to, 153.

Revocation of signature to, 201, n. 27.

Death as revocation of, 201, n. 27.

ACCOUNTING—

Change in time or mode of as discharge of fidelity bond, 218.

Change of time for of public officer, 275.

ACCOUNT—

Failure to as breach of administration bond, 325.

Final settlement and adjudication on of executor or administrator conclusive on principal and surety, 331.

References are to Sections.

ACCOUNT—Continued.

Allowance of periodic of executor or administrator *prima facie* evidence for or against surety, 331.

Rule as to guardian's, 342.

ACCOUNTS—

Of public officers as evidence against sureties, 271.

Principal's as admissions against surety, 257.

Stipulations in fidelity bond as to examination of risks, 208.

ACT OF GOD—

As excuse for loss of public funds, 268, 269.

As exoneration of bail, 305.

ACT OF THE LAW (see Bankruptcy; Death; Limitations, Statute of)—

Discharge of principal or surety by, 195 et seq.

As exonerating bail, 306.

ACTION—

Suretyship gives rise to joint, 3.

Principal and guarantor cannot be joined in, 3.

Necessity of against principal under guaranty of collection, 107, 105 et seq.

Time and place of under guaranty of collection, 107.

To enforce subrogation, 143.

By surety to compel principal to pay or creditor to sue principal, 176, 177.

Against surety or absolute guarantor need not be preceded by demand and notice, 184.

Creditor may discontinue without releasing surety or absolute guarantor, 224.

Creditor need not bring against principal under absolute guaranty or technical suretyship before suing guarantor or surety, 224.

Creditor under conditional guaranty must exhaust remedy by, 105 et seq.

On appeal bonds, 294.

Conditions precedent to—execution, 294.

On guardian's bond, 344.

ADDITIONAL BONDS (see Substituted Bonds)—

Of public officer, 277.

Of executor or administrator, 327.

Of guardian, 339.

ADDITIONAL SECURITIES—

Creditor not bound to seek or take for protection of surety, 224.

ADMINISTRATION—

Creditor not bound to take out to protect surety or absolute guarantor, 224.

ADMINISTRATION BONDS—

When bond required of executor, 313.

When required of administrator, 313.

Effect of failure to give, 313.

Form, requisites and conditions of, 314, 315.

Extent of surety's liability on, 315.

Liable for official misconduct only, 315, 321.

Estoppel of sureties on, 316.

Property covered by, 317.

Liabilities of sureties on for debts due from principal to the estate, 318.

Liability on for foreign assets, 319.

Liability on for acts of co-executors or co-administrators, 320.

References are to Sections.

ADMINISTRATION BONDS—Continued.

- What constitutes breach of, 322.
- Devastavit under, 323.
- Maladministration as breach of, 323.
- Negligent loss as breach of, 323.
- Failure to pay debts, legacies, or distributive shares as breach of, 324.
- Failure to account as breach of, 325.
- Liability of general, and special or sale bonds, respectively, 326.
- Additional, successive, and substituted, 327.
- Contribution and exoneration as between, 327.
- Duration of liability on, 328.
- Death of principal or surety on, 329.
- Removal or resignation of principal on, 330.
- Settlement by and discharge of principal under, 330.
- Effect of settlement by and discharge of principal, 331.
- Alteration of discharges sureties, 332.
- Adjudication upon final settlement conclusive as to sureties, 331.
- Giving time to principal discharges, 332.
- Retention of property in different capacity discharges, 333.
- Giving special bond for distributive share discharges, 334.
- Statute of limitations as discharge of, 335.

ADMISSIONS—

- How far principal's binding or admissible against surety, 257.
- Books of account as, 257.

AFFIRMANCE—

- What constitutes under appeal bond, 292.
- Partial, as breach of bond, 292.

AFTER-ACQUIRED SECURITIES—

- Subrogation extends to, 135.

AGENCY (see Agent, Authority).**AGENT (see Authority)—**

- Contracts of guaranty or suretyship through, 30.
- Authority of surety company's general, 30.
- Delivery of suretyship contract by, 44.
- Principal may be to deliver, 44.
- Delivery by stranger, 44.
- Authority of to fill blanks in specialty, 47.
- To fill up negotiable instrument entrusted to him in blank, 212.
- Obligee's as to representations preliminary to surety bond, 53.
- Promise of del credere not within Statute of Frauds, 76.
- Breach of trust by common giving rise to contribution, 149.

AGREEMENT—

- To forbear against principal as condition precedent to suretyship, 17.

"AGREEMENT"—

- How word interpreted under Statute of Frauds, 86.

AGRICULTURAL LIEN—

- Subrogation of surety for rent to, 145.

ALTERATION OF CONTRACT—

- Material without consent of surety releases him, 209.
- Principle stated, 209.
- In particular meant for sole protection of principal does not discharge surety, 209.
- By stranger—spoliation, 210.
- At what time must be made to discharge sureties, 211.
- Effect of surety's consent, 211.

References are to Sections.

ALTERATION OF CONTRACT—Continued.

- Of negotiable instrument—effect of on liability of guarantor or surety, 212.
- Ratification after binds surety, 211.
- Of negotiable instrument negligently drawn—rights of bona fide holders, 212.
- Rule where negotiable instrument executed and delivered in blank, 212.
- Conforming instrument to intention of parties, 210n, 6.
- To discharge surety or guarantor must be material, 213.
- What deemed material, 213.
- Adding name of another surety as material, 213n, 21.
- Effect of by changes beneficial to surety or guarantor, 214.
- By reduction of debt or rate of interest, 214.
- As to character of principal's office or employment, 215.
- Rule as to public officers, 274.
- Examples of material in office or employment, 216.
- Extension or enlargement of principal's business as, 217.
- Change in time or mode of accounting as, 218.
- Change in compensation as under fidelity bond, 219.
- Rulings under corporate fidelity bonds, 220.
- Rulings under special clauses permitting changes of duty or employment, 220.
- Of contracts for particular works, 221.
- Changes in or departure from contract secured as discharge of contract insurance bond, 222.
- Change in lease or terms of letting as discharging tenant's surety, 223.
- Sufficient to release surety releases securities held by him for debt, 182.
- Release of collaterals may constitute, 286.
- As discharge of bail, 309.
- As discharge of sureties on administration bond, 332.
- As discharge of official bond, 273.
- Change of official duty as, 274.

ADJUDICATION (see Judgment).**AMBIGUITY—**

- Parol evidence to explain under Statute of Frauds, 85.

AMENDMENT—

- Of attachment bond, 280.

AMOUNT—

- To which guarantors liability limited, 98, 101.
- Recoverable under right to indemnity, 127, 131.
- Recoverable under right to contribution, 156.

ANOMALOUS INDORSER—

- Liability of, 6.
- Not bound for contribution to surety maker, 153.

ANNUAL OFFICE (see Official Bonds)—

- Sureties for principal in, 270.

APPEAL BONDS—

- Nature, purpose and necessity of, 289.
- Penalty of, 289.
- Form and execution of, 290.
- Conflicting rules as to excessive conditions in, 290.
- Mandatory and directory requirements of statutes as to, 290.
- Waiver of defects in, 290.
- Must identify judgment, 290.
- Must identify appellant, 290.

References are to Sections.

APPEAL BONDS—Continued.

- Other defects in, 290.
- Consideration for, 291.
- Estoppel of sureties on, 291.
- On appeal from void judgment, 291.
- Breach of condition of, 292.
- Must be substantial affirmance to constitute breach of, 292.
- What constitutes, 292.
- Affirmance in part under, 292.
- Rights and liabilities of successive sureties thereon, 151, 293.
- Actions and remedies on, 294.
- Conditions precedent to actions on, 294.
- Damages on, 294.

APPEARANCE BAIL—

- Defined, 203n, 2.

APPLICATION—

- Statements in for surety bond, 53.
- When deemed warranties, 53.

APPLICATION OF PAYMENTS (see Payment, Bank)—

- Of money received by officer in one term to defaults in prior term, 270.
- Rules as to, 191.

APPROVAL—

- Of official bonds, 262.

ARREST—

- Of principal by bail, 302.
- And imprisonment of principal as discharge of bail, 307.

ASSIGNABILITY OF GUARANTY (see Assignment of Guaranty).**ASSIGNEE (see Assignment; Negotiation; Negotiable Instrument)—**

- Estoppel of surety or guarantor in favor of, 49, 113.
- Subrogee deemed an equitable, 133, 139.

ASSIGNMENT—

- Oral guaranty in of securities is valid, 73.
- Of contracts of suretyship or guaranty and their assignability, 112, 113.
- Rights of assignee under, 113.
- Of surety bonds, 114.
- Subrogee deemed to take by equitable, 133, 139.
- Effect of upon rights of stranger paying debt of another, 138.
- To surety who compounds with creditor does not give him right to more than indemnity, 127.
- Of surety's right of subrogation, 148.
- Of surety's claim for reimbursement, 120n, 18.
- To surety of principal's counterclaims against creditor, 148.

"ASSIGNMENT FOR BENEFIT OF CREDITORS"—

- How phrase interpreted in credit indemnity bond, 95.

ASSIGNOR—

- Of lease as surety, 11.

ASSUMPSIT—

- Special is proper action on guaranty, 63.
- Implied lies for by surety for reimbursement, 117.
- Implied lies for contribution, 149.

ASSUMPTION—

- By partner of firm debts as creating suretyship, 8.

ASSUMPTION OF MORTGAGE (see Mortgage)—

- Suretyship by, 10.

References are to Sections.

ATTACHMENT (see Attachment Bonds)—

Release of as release of surety, 249.

Remedy for wrongful, 279, 281.

Bond to dissolve, 281.

ATTACHMENT BONDS—

Nature and purpose of remedy by attachment, and attachment bonds, 279.

Giving of is jurisdictional, 279.

Punitive, exemplary or consequential damages against sureties on, 279.

Are sureties thereon liable for damages for malicious prosecution or abuse of process, 279.

Form and conditions of, 280.

Defective, 280.

Amendment of, 280.

When effective as common law obligations, 280.

Strictly construed, 281.

Effect of judgment against principal on as to sureties, 281.

What constitutes breach of, 281.

Forthcoming and redelivery bonds, 282.

Bonds to dissolve, 283.

ATTORNEYS AT LAW—

As sureties in judicial proceedings, 23.

ATTORNEY'S FEES—

In contribution, 156.

As damages on injunction bond, 301.

As damages on replevin bond, 288.

As damages on attachment bond, 281.

AUDITS—

Stipulations for as warranties, 208.

AUTHORITY—

Of partner to bind firm as guarantor or surety or by accommodation paper, 29.

Of agent to bind principal as guarantor or surety strictly construed, 30.

Of general agent of surety company, 30.

To fill blanks, 47.

To fill blanks in sealed instruments, 47.

Of officer of corporation as to representations preliminary to surety bond, 53.

Implication of from intentional delivery of negotiable instrument executed in blank, 212.

AVAL (see Anomalous Indorser)—

Not liable for contribution to surety-maker, 153.

B.**BAIL—**

Of one partner cannot have indemnity from other's, 121.

Right to release on in criminal cases, 203, n. 2.

Definition and nature, 302.

As sureties, 302.

Dominion of over principal, 302.

May arrest principal, 302.

May arrest him on Sunday, 302.

May arrest him by deputy, 302.

May arrest him without process, 302.

May command services of sheriff, 302.

Bond and recognizance distinguished, 303.

Requisites of bond or undertaking, 303.

Mandatory and directory provisions in statutes as to bond, 303.

References are to Sections.

BAIL—Continued.

- Exacting excessive or unauthorized bond, 303.
- Defects not invalidating bond, 303.
- Liability of sureties—breach and forfeiture, 304.
- Exoneration of bail, 304.
- Appearance of principal as exoneration of, 304.
- Act of God as exoneration of, 305.
- Act of Law as exoneration of, 306.
- Subsequent imprisonment of principal as exoneration of, 307.
- Imprisonment in another state as, 307.
- Pardon as exoneration of, 307.
- Discharge of principal in bankruptcy releases civil, 308.
- Alteration of contract discharges, 309.
- Relief from and remission of forfeiture, 310.
- Conditions of relief, 310.
- Indemnification of, 311.

BAIL BOND (see Bail)—

- Requisites of, 303.
- Distinguished from recognizance, 303.

BAIL ABOVE—

- Defined, 203, n. 2.

BAIL BELOW—

- Defined, 203.

BAILEE—

- Public fiscal officer as, 268, 269.

BANK—

- Not usually bound to apply debtor's deposit in relief of surety or indorser, 193.
- Conflicting views as to above, 193.
- Effect of releasing part of deposit, 193.
- Does increase of capital stock of discharge bond of cashier, 217.

BANK DEPOSIT—

- Liability of guardian for loss of, 338.

BANKRUPTCY—

- Of principal releases civil bail, 308.
- Meaning of in credit indemnity bond, 95.
- Of co-surety as defense to contribution, 163.
- Discharge of principal in does not release surety, 195.
- Rule where surety consents, 195.
- Rule as to foreign proceedings, 195.
- Of principal as bar to surety's reimbursement, 196.
- Right of surety to prove against principal in, 196.
- Of surety, 197.
- Creditor need not file in for protection of surety or absolute guarantor, 224.

BENEFICIAL—

- Alterations that are as discharge of surety, 214.
- Reduction of debt, 214.

BENEFICIARIES—

- Third persons as under contracts of suretyship or guaranty, 115, 116.

BENEFICIARY—

- Right of to sue under suretyship contract, 77, 115, 116.

BILL OF EXCHANGE (see Acceptance; Negotiable Instruments)—

- Is oral acceptance or promise to accept within Statute of Frauds, 79.

References are to Sections.

BILLS AND NOTES—

- Subrogation of successive parties to under joint judgment, 140.
- Contribution and indemnity between accommodation and other parties to, 153.
- Payment by surety's own as basis for contribution, 156.
- Payment by surety with own as basis for indemnity, 130.
- Presumption of extension of time from receipt of, 239.

BLANK—

- Bona fide payee or purchaser of contract executed in, 47.
- Effect of negligent leaving of on negotiable instrument, 212.

BONA FIDE HOLDER—

- Of corporate accommodation paper, 26, n. 21.
- Of accommodation paper of firm, 29.

BONA FIDE OBLIGEE—

- Of contract of suretyship conditionally delivered, 45.
- Of contract executed in blank, 47.

BONA FIDE PURCHASER—

- Wife may prove her suretyship as against on husband's note, 21, n. 16.
- Not affected by conditions not appearing on face of suretyship contract, 46.
- Rights of against surety where principal's signature forged, 48.
- Subrogation as against, 134.

BOND—

- Payment by surety's own as basis for contribution, 156.

BONDING COMPANY (see Surety Company; Surety Bonds).

BONDS (see Official Bonds; Judicial Bonds; Administration Bonds;

- Bail; Appeal Bonds; and other appropriate titles)—
- Doctrine of concealment as applied to surety company's, 52.
- Of surety companies in nature of insurance policies, 27.
- Of surety company, how construed, 93.
- As substitute for mechanic's liens, 116.

BOOKS—

- Warranty that principal's have been examined and found correct, 54.

BOOKS OF ACCOUNT—

- Entries in as evidence of direct or collateral undertaking under Statute of Frauds, 65, n. 18.

BREACH OF TRUST—

- Subrogation of surety to rights of obligee against strangers participating in, 144.
- By common agent as giving rise to contribution, 149.

BREWING COMPANY—

- Guarantee of rent by, 26.

BUILDING CONTRACTS—

- Alterations discharging surety on, 221, 222.
- Payment of contractor in advance of time stipulated as discharge of surety on, 222.

BURDEN OF PROOF (see Presumptions; Evidence)—

- As to breach of condition or promissory warranty in surety bond, 208.
- As to notice and proofs of loss under surety bond, 188.

BUSINESS—

- Extension or enlargement of principal's as alteration of bonded employment, 217.
- Warranty that risk is not engaged in other, 54.

References are to Sections.

C.

CAPIAS—

Imprisonment of principal under as release of surety, 190.

CAPITAL STOCK—

Does increase of bank's discharge surety for cashier, 217, n.

CASH BAIL—

No common law authority for, 311, n. 59.

Cannot be recovered of sheriff unless authorized by law, 311, n. 59.

CAVEAT EMPTOR—

Créditor acting in bad faith cannot invoke as against surety, 51.

CERTAINTY—

Of extension of time to release surety, 232.

CHANGE (see Alteration of Contract)—

Material in contract as release of surety, 209 et seq.

CHATTEL MORTGAGE—

Is creditor bound to enforce against principal or lose recourse, 224.

CO-ADMINISTRATORS—

Liability of bond for, 320.

CO-DEBTOR—

Subrogation of one who pays to remedies under direct security, 142.

CO-DEBTORS—

As sureties, 13.

Effect of releasing one of several, 241.

Reservation of rights upon release of one of several, 242, 243.

CO-EXECUTORS—

Liability of bond for, 320.

As sureties, 13.

Effect of releasing one of several, 241.

Reservation of rights upon release of one of several, 242, 243.

COLLATERAL—

Undertaking of guarantor is, 3.

COLLATERAL ATTACK—

Final settlement with executor or administrator not open to, 331.

Rule as to guardians, 342.

COLLATERAL PROMISE—

Remedy on is by special assumpsit, 63.

Meaning of with respect to Statute of Frauds, 61, 65.

COLLATERAL SECURITIES (see Subrogation)—

Must guarantee of collection exhaust, 108.

Subrogation of surety to, 140.

Co-debtor paying debt entitled to benefit of those given by fellows, 142.

Effect of release or loss of on right to contribution, 162.

COLLECTION (see Conditional Guaranty)—

Nature of guaranty of, 206 et seq.

COLOR OF OFFICE—

Acts by, 264.

COMMERCIAL PAPER (see Bills and Notes; Negotiable Instruments;

Acceptance; Indorser)—

Accommodation parties to, 4.

Nature of liability of parties on as sureties, 4.

Must guarantee on express consideration, 87.

COMPENSATION—

Change in amount, time or mode of payment of principal's as discharge of fidelity bond, 219.

Changing public officer's does not discharge bond, 274.

References are to Sections.

COMPOSITION—

Surety effecting is entitled to indemnity only, 127.

Cost of measures right to contribution, 156.

With principal releases surety unless surety consents to remain bound, 240.

COMPOUNDING FELONY—

Surety on contract for not bound, 58.

COMPROMISE—

Surety effecting confined to indemnity, 127.

Contribution limited to cost of, 156.

Creditor may as to disputed claim held of principal as security without releasing surety, 249.

CONCEALMENT—

What constitutes fraudulent by creditor as against surety, 51.

Rule as to under surety bonds, 52.

Of positive dishonesty of principal, 52.

Rule as to public official principal, 52, 276.

Of fact that risk had been speculating where general inquiry made, 54.

Under surety bond, 52.

Especially after inquiry, 52.

Effect of fraudulent upon statute of limitations as to surety, 206.

Of principal's dishonesty in the guaranteed employment as discharge of surety, 207, 208.

CONDITION—

Presumptions as to where instrument not signed by principal or co-sureties named therein, 45.

CONDITIONAL EXECUTION—

Failure of principal or co-surety named in body of contract of suretyship to execute it where execution by him condition of co-surety's liability, 45.

Presumptions and burden of proof as to, 45.

Other conditions, 45, 46.

CONDITIONAL GUARANTY—

Defined and distinguished, 105.

Guaranty of collection is, 105.

Examples of, 106.

Creditor under bound to exercise due diligence against principal, 105.

What constitutes due diligence under, 107.

Must creditor exhaust collaterals under, 108.

Time and place of bringing and prosecuting suit against principal under, 109.

Notice of default under, 110.

Waiver of diligence by creditor under, 111.

CONDITIONAL PROMISE—

To extend time to principal as release of surety, 227.

CONDITION PRECEDENT—

Non-performance of as release of surety or guarantor, 19.

Illustrations of, 19.

Execution by principal or co-surety as, to surety's liability, 45.

CONDITIONS (see Warranty)—

Construction of in surety bonds, 54.

Recitals of bond may control, 220n, 29.

CONDITIONS PRECEDENT—

Notice and proofs of loss or default as under surety bonds, 187.

CONFLICT OF LAWS—

As to Statute of Frauds, 88.

References are to Sections.

CONSENT—

By creditor to discharge of principal in bankruptcy proceedings does not release surety, 195.

By surety to extension of time to principal, 231.

CONSEQUENTIAL DAMAGES—

Recovery of by surety from principal, 128.

On attachment bonds, 279.

CONSIDERATION (see Extension of Time)—

Required where guaranty or suretyship is by simple contract, 14.

Need not be adequate, 16.

When same supports contract of both principal and guarantor or surety, 15.

When consideration for principal's undertaking will not support that of guarantor or surety, 16.

Contemporaneous and subsequent guaranty, 15, 16.

Where guaranty given pursuant to prior agreement, 16.

Present consideration will support guarantee of prior and contemporaneous debt, 16.

For extension of time to principal as against surety or guarantor, 17.

Forbearance as, 17, 18.

Abandonment of rights as, 17.

Must be lawful, 58.

Failure of for undertaking of guarantor or surety, 19.

Non-performance of condition precedent as failure of, 19.

Distinct and valuable moving to guarantor from creditor dispenses with notice of acceptance of guaranty, 33.

New and independent as taking guaranty out of Statute of Frauds, 69 et seq.

Character of under "Main Purpose Rule," 69 et seq.

Must it move from promisee to take guarantee out of Statute of Frauds, 72.

When release of lien or incumbrance is to take guaranty out of Statute of Frauds, 74.

Expression of in guarantee of commercial paper, 87.

Must it be expressed under Statute of Frauds? 86.

What sufficient expression of under, 87.

Expression of in guarantee does not supply lack of, 87.

For undertaking on appeal, 191.

Failure of as against principal as defense to surety, 194.

Want of as defense to voluntary bond of public officer, 263.

Extension of time must be upon to release surety, 233.

CONSTITUTIONALITY—

Surety may raise question of as against exemption laws, 119.

CONSTITUTIONAL LAW—

Right to bail under, 121.

CONSTRUCTION (see Interpretation).**CONTEMPORANEOUS GUARANTY—**

Consideration for, 15.

Binding without notice of acceptance, 34.

CONTINUING GUARANTY (see Guaranty)—

Defined and distinguished, 97.

Evidence to show intention, 97.

What deemed, 98.

Examples of, 99.

Revocation of by notice or death, 103.

Notice of default under, 41, 185.

References are to Sections.

CONTRACT (see Alteration of Contract)—

In part within Statute of Frauds, 80.

For reimbursement and indemnity of sureties, 120, 131.

Implied for contribution and indemnity between parties to bills and notes, 153.

Modification of right to contribution by special, 157, 152n, 131.

Equity will enforce special for indemnification of surety, 178.

Material alterations of as discharge of surety, 209 et seq.

CONTRACT INSURANCE—

Defined, 222.

Changes in contract secured by, 222.

CONTRIBUTION—

Among stockholders with respect to statutory liability, 12n.

General nature and basis of right to between co-sureties, 149.

Originally enforceable in equity, 149.

Enforceable by implied assumpsit, 149.

Legal and equitable remedies for contrasted, 149.

Right of qualifiable by contract, 150.

Applicable in all cases of common charge or burden, 149.

Who are co-sureties under rules allowing, 150.

Parol evidence to show co-suretyship, 150.

Effect of death of co-surety upon right of, 149.

Between co-principals, 149n, 8.

Sureties bound by different instruments may be co-sureties, 150.

Sureties bound at different times may be, 150.

May surety who requests co-surety to sign have? 150.

Sureties bound for different debts cannot have, 150, 152.

Rule as to successive sureties, 152.

Rule as to surety for a surety, 152.

Where defendant is promised indemnity, 151.

Between successive sureties in legal proceedings, 152.

Between sureties for different or unconnected things, 153.

Between accommodation and other parties to bills and notes, 153.

Rule as to surety maker or co-maker and guarantor, 153.

Rule as to anomalous indorsers, 153.

When right to become enforceable by action, 154.

Limitation of actions for, 154, 165.

On debt by installments, 154.

Mere volunteer cannot have, 155.

Who deemed volunteer, 155.

Amount recoverable under right of, 156.

Between several bonds with different penalties, 156.

Where several sureties bound by same instrument but in different amounts, 156.

Firm surety treated as individual in, 156.

Limited to cost of discharging debt secured, 156.

Interest as an element in, 156.

Costs as an element in, 156.

Counsel fees recoverable in, 156.

Surety cannot claim more than his just proportion of cost of discharge, 156.

Defenses to actions for in general, 158.

Surety indemnified, 158.

Time given to co-surety or principal, 160, 241, 242.

Death of co-surety as a defense to, 164.

Amount for which surety may prove against estate of co-surety, 164, 170.

Statute of limitations as defense to, 154, 165.

Set-off and counterclaim as defense to, 166.

References are to Sections.

CONTRIBUTION—Continued.

- Fraud or illegality as a defense to, 167.
- Extent of release from by giving time to surety, 160.
- Release of principal by creditor as defense to, 161.
- Release of co-surety by creditor as defense to, 161.
- Release or loss of collaterals as defense to, 162.
- Bankruptcy of co-surety as defense to, 163.
- Misconduct of surety contributing to default as defense to, 167.
- Equity may declare right to before payment, 180.
- As between additional, successive, and substituted administration bonds, 327.
- Between sureties on successive appeal bonds, 152, 293.
- Parties to actions for, 120, n. 18.

CONVENTIONAL SUBROGATION—

- Explained, 136.
- Of stranger paying debt of another and taking assignment, 138.

CONVEYANCE—

- Subject to mortgage, 10.

CO-PROMISOR (see Co-debtors)—

- Effect of release of one, 240.

CORPORATE SURETIES (see Corporations; Surety Companies; Surety Bonds).

CORPORATION—

- Estoppel of sureties of, 49.
- As guarantor or surety, 26.
- Surety bound on ultra vires contract of, 26.
- Subrogation of sureties to lien of, 145.
- Married woman stockholder as indorser for, 21n, 12.

COST BOND—

- Effect on of surety's death, 202.

COSTS (see Counsel Fees)—

- When recoverable under right of reimbursement, 123.
- To surety seeking contribution, 156.
- As condition of remitting bail, 310.

CO-SURETIES—

- Who are under rules allowing contribution, 150 et seq.
- Right of contribution between, 149 et seq.
- Contracts as to indemnity and contribution between not within Statute of Frauds, 76.
- Effect of release of securities held by creditor from, 251.
- Release of as affecting right to contribution, 161, 241.
- How far judgment against principal or co-surety binds, 255.

COUNSEL FEES—

- In contribution, 156.
- As an element of damages on replevin bond, 238.

COUNTERCLAIM (see Set-Off; Payment, Bank)—

- In actions for contribution, 165.

COUNTER SECURITY—

- Right of sureties for executor or administrator to exact, 327.

COVENANT NOT TO SUE—

- Effect of as to co-debtors, 242.
- Effect of as to sureties, 242.
- Reservation of rights in, 242, 243.

COVERTURE (see Husband and Wife; Married Women).

CREDIT—

- Misrepresentations as to another's, 81.

References are to Sections.

CREDIT INSURANCE—

Nature of, 95.

Meaning of various phrases in policies of descriptive of the risk, 95.

CREDITOR—

Guarantor or surety is of principal, 119.

CRIMINAL BAIL (see Bail; Indemnification of Bail).

CUMULATIVE—

When official bonds deemed, 270.

CURRENCY—

Payment by surety in depreciated, 127.

CUSTOMARY CREDIT—

Extension of time beyond releases surety, 232.

D.

DAMAGES (see Costs; Counsel Fees)—

Under contracts for reimbursement or indemnity, 131.

Covenant to indemnify against, 131.

When cause of action to indemnify against accrues, 204.

Remote not recoverable by surety against principal, 128, 279.

On attachment bonds, 279.

On appeal bonds, 294.

On supersedeas bonds, 289, 294.

On replevin bonds, 288.

On injunction bond, 301.

DEATH—

Revocation of guaranty by, 103, 201, 202.

Effect of co-surety's on right of contribution, 149, 164.

Abatement of replevin action by no breach of bond, 286.

Of principal or surety on administration bond, 329.

Effect of guarantor's under guaranty of future advances, 201.

Of guarantor with respect to particular office or employment, 202.

Of member of firm principal or obligee, 198, 203.

Rule where guarantee is for a class, house, or body, 203.

Of accommodation party to commercial paper, 201n, 27.

Of guarantor of lease, 202.

Of surety on cost bond, 202.

Of joint principal discharges estate, 203.

Of principal or surety in joint obligation as discharge of surety, 199, 203.

Of joint and several promisor does not release co-promisors, 200.

Effect of upon guaranty of future advances, 201.

Effect of on right to contribution, 164.

DEBT—

Distinction between action of and special assumpsit, 63.

Action of will not lie on strictly collateral promise, 63.

Assignor of mortgage as surety, 10.

Non-payment of is not dishonesty or embezzlement under surety bond, 94.

When surety for one entitled to subrogation though others owing from same principal, 137.

Liability of sureties for executor or administrator for debts due from principal to deceased, 318.

Assumption of firm's as creating suretyship, 8.

Promise by partner to co-partner to pay firm's, 77, n. 51.

"DEBT, DEFAULT OR MISCARRIAGE"—

Meaning of under Statute of Frauds, 64.

References are to Sections.

DEBTS (see Debt)—

- Suretyship by partner assumption of firm's, 8.
- Failure to pay as breach of administration bond, 324.

DEBTOR—

- Oral promise directly to, to pay debt not within Statute of Frauds, 77.
- Public fiscal officer as with respect to public moneys, 268.

DEBTORS—

- Release of one of several bound for the same debt, 241.
- Covenant not to sue one of several, 242.

DE FACTO OFFICER—

- Bond of valid, 260.

DEFAULT (see Notice of Default)—

- Under Statute of Frauds, 64.
- When surety or absolute guarantor is in, 3, 224.
- Concealment of principal's under fidelity bond, 207, 208.

DEFENSES—

- Reimbursement of surety who pays in spite of principal's, 123.
- Contribution to surety who pays in spite of his own, 155.

DEL CREDERE AGENT—

- Promise of not within Statute of Frauds, 76.

DELIVERY (see Agents; Authority; Conditional Execution and Delivery)—

- Of memorandum unnecessary under Statute of Frauds, 83.
- Principal in bond as agent to make, 44.
- To payee of instrument executed in blank, 212.

DEMAND—

- On principal or notice of his default, not necessary before action against surety or absolute guarantor, 3, 184.
- May be specially stipulated for, 184.
- Need not precede suit for contribution, 154.
- Not necessary to suit on replevin bond, 276.

DEPART—

- Condition of bail bond not to, 304.

DEPOSIT—

- By guardian or administrator in his own name, 338.
- Rules of as to application of surety's by creditor bank, 193.

DEPRECIATED CURRENCY—

- Rights of surety paying in, 127.

DEPRECIATION—

- Of securities no ground for compelling sale before maturity at instance of surety, 179.

DEPUTIES—

- Official surety liable for defaults of, 267.

DEVASTAVIT—

- As breach of administration bond, 323.

DILIGENCE—

- Surety not released by want of, 3.
- Guarantor may be released by want of, 3.
- What is under guaranty of collection, 107, 108, 109.
- Waiver of under guaranty of collection, 111.
- No duty of active upon creditor as against surety or absolute guarantor, 224.

"DIRECT"—

- Meaning of in cases under Statute of Frauds, 61, 65 and n 18.

References are to Sections.

DIRECT SECURITIES—

Subrogation of surety to, 140, 141.

DISCHARGE—

Of principal by act of law as discharge of surety, 195.

Of executor or administrator conclusive as to sureties, 331.

DISCHARGE IN BANKRUPTCY (see Bankruptcy).

DISCONTINUANCE—

Of action against principal no release of surety or absolute guarantor, 224.

DISHONESTY—

Receiving surety without disclosing principal's in prior employment, 51.

Effect of concealing under fidelity bond, 52, 207, 208.

DISMISSAL—

As breach of attachment bond, 281.

DISTRESS—

Landlord not bound to resort to to protect surety or absolute guarantor, 224.

DISAFFIRMANCE—

Effect of by infant principal on surety's liability, 22.

DISTRIBUTIVE SHARES—

Failure to pay as breach of administration bond, 324.

Effect of giving special bond for, 334.

DRAWER—

Of bill in attitude of surety, 4n, 23.

DUE DILIGENCE (see Negligence)—

What constitutes under guarantee of collection, 107, 108.

DURESS—

Of surety by obligee renders contract voidable, 57.

On principal may release surety, 57.

Practiced by creditor upon surety avoids suretyship contract, 57.

By creditor on principal may not avoid surety's contract, 57.

By principal on surety no defense as against innocent obligee, 57.

Effect of excessive conditions in official bonds inserted under, 261n, 9.

When bond of public officer deemed exacted by, 263.

Illegal or excessive bail bond deemed given under, 303.

E.

EMPLOYEE—

Change in duties of bonded as discharge of surety, 215, 216.

EMPLOYMENT (see Alteration of Contract)—

Warranty that risk not engaged in other, 54.

Guaranty of where contract of contains renewal clause, 102.

Change in character, considerations, or compensation of as discharge of surety, 215 et seq.

ENGINEER—

Paying principal without certificate of, 209.

ENLARGEMENT—

Of principal's business as discharge of fiduciary bond, 217.

ENTRIES (see Accounts; Books of Account)—

In books of account as evidence under Statute of Frauds, 65, n. 18.

EQUITABLE DEFENSE—

Extension of time to principal originally an, 225, n. 20.

So still considered in some states as to joint promisors or covenantors, 225, n. 20.

References are to Sections.

EQUITIES—

Subrogation must yield to superior, 134.

EQUITY—

Surety's to reimbursement, 117.

Origin of contribution in, 149.

Rules as to contribution in contrasted with rules at law, 149.

Retains concurrent jurisdiction as to contribution, 149.

Doctrine of release of surety by extension of time originated in, 225, n. 20.

Doctrine of subrogation originated in, 133.

Right in of surety to sue creditor to compel him to proceed against principal, 176.

May declare right of subrogation before payment, 136.

Enforcement of contract for indemnity in, 178.

When will compel creditor to resort to securities of principal in the first instance, 179.

May compel surety to exonerate co-surety before payment, 180.

Form of relief in such cases, 180.

ESTOPPEL—

Of surety to deny authority to deliver contract of suretyship, 44.

Of surety to deny recital in his bond, 49.

Of surety to question validity of principal's contract, 49.

Of surety to show forgery of principal's name, 48.

Of surety as to principal's appointment or election to office, 49.

Of surety to deny existence of corporate principal, 49.

None against surety to show illegality, 58.

Doctrine of applies to surety bonds as to other forms of insurance, 50.

Of creditor inducing surety to believe debt is paid or that surety will not be called upon, 252.

Of sureties on official bonds, 260, 262.

From execution of appeal bond, 291.

Of sureties on administration bond, 316.

Of sureties on guardian's bond, 337.

EVIDENCE (see Presumptions; Burden of Proof; Judgments)—

Admissible to show joint obligation intended to be joint and several, 199, 200.

Parol to show suretyship, 2, 150.

Of intention of wife to charge separate estate, 21.

Book entries as, to show whether promise direct or collateral under Statute of Frauds, 65, n. 18.

Parol to explain memorandum under Statute of Frauds, 85.

Against risk under fidelity bond, 132.

Burden of proof as to breach of conditions as to supervision of risk in fidelity bond, 208.

Extension to release surety must be proved by preponderance of, 238.

Of extension agreement by taking bill or note, 239.

Receipt of interest in advance as, of extension, 239.

Of worthlessness of securities held of principal, 249.

Judgment against principal as, against surety, 254.

Judgment against principal or co-surety as, against surety, 255.

Statements and admissions of principal as, against surety, 257.

As to time of default of public officer, 270.

Accounts of public officer as against surety, 271.

Of capacity in which guardian and personal representative holds property, 340.

Judgment against receiver as, 297.

References are to Sections.

EXCESSIVE CONDITIONS—

In appeal bonds, 290.

EXCESSIVE PENALTIES—

Effect of exaction of on official bond, 263.

EXCHANGE—

Of securities does not release surety, 246.

EXECUTION (see Conditional Execution)—

When guarantee must prosecute suit against principal to, 107.

Recovery by surety of costs of, 128.

When surety may have against principal under joint judgment, 143, n. 70.

Creditor's failure to issue does not release surety or absolute guarantor, 224.

Creditor not bound to levy to preserve liability of surety, 247.

Release of lien of as release of surety, 250.

Issue of ministerial act, 265.

Against principal as prerequisite to action on appeal bond, 294.

EXECUTION SALE—

Principal cannot purchase surety's property at for debt secured, 119.

EXECUTORS AND ADMINISTRATORS (see Death; Administration Bonds)—

Contribution as against deceased co-surety's, 149, 164.

Of a deceased joint and several promisor cannot be joined with survivor, 201, n. 26.

EXECUTORY CONTRACT—

For extension of time no discharge of surety, 227.

EXEMPLARY DAMAGES—

Against sureties on attachment bond, 279.

EXEMPT PROPERTY—

Liability of sureties of officers for levy upon, 264.

EXEMPTION LAWS—

When surety may question constitutionality of, 119.

EXONERATION (see Bail; Equity; Securities; Remedies)—

Surety's right in equity to compel creditor to sue principal for surety's, 176.

Of surety by co-surety in equity before payment, 180.

Form of relief in such cases, 180.

EXPENSES—

Of preserving or enforcing securities as an element in contribution, 156.

EXTENSION—

Of principal's business as discharge of fidelity bond, 217.

EXTENSION OF TIME (see Covenant Not to Sue; Release; Forbearance)—

Unauthorized releases surety or guarantor, 10, 13, 225.

Rules as to stated and discussed, 225.

Immaterial that surety not injured, 225.

Does not release surety who consents, 225, 231.

Does not release surety who is indemnified, 225, 230.

Does not release surety if rights against him reserved, 225, 228.

Does unauthorized discharge surety acceptor, maker, or co-maker at common law or under Negotiable Instruments Law? 226.

Agreement for to discharge surety or guarantor must be binding, 227.

Contract for void because of fraud no release, 227.

Contract for unenforceable under Statute of Frauds does not release, 227.

References are to Sections.

EXTENSION OF TIME—Continued.

- Executory or conditional contract for no discharge, 227.
- Reservation of rights against surety under agreement for prevents discharge of surety, 225, 228, 229.
- Form under in which rights against surety reserved, 229, 243.
- Effect of when surety indemnified, 230.
- Effect of surety's consent and waiver under, 231.
- To release surety must be for definite period, 232.
- What deemed definite extension of, 232.
- Beyond customary term of credit as release, 232.
- Must be upon consideration to release surety, 233.
- What constitutes sufficient consideration for, 234.
- Payment of interest in advance as consideration for, 234.
- Promise to pay interest at advanced rate is consideration for, 234.
- Promise to pay at legal or contract rate or lower rate at end of extension period as consideration for, 234.
- Part payment before due as consideration for, 234.
- Usurious interest as consideration for, 234.
- Creditor must have knowledge of suretyship in order to release surety by, 236.
- Rule as to partners assuming firm debts, 236.
- Parol of specialty as discharge, 237.
- Pleading, 238.
- Presumption of from taking collateral securities, 239.
- Presumed from taking principal's bill or note, 239.
- Presumed from taking interest in advance, 239.
- For accounting by public officer as release of sureties, 275.
- Unauthorized as a release of grantee assuming mortgage debt, 10.
- To joint debtor no release of fellows, 13.
- To principal is consideration for guaranty or suretyship, 17.
- To principal discharges administration bond, 333.

EXTRINSIC EVIDENCE (see Evidence; Parol Evidence).

F.

FAILURE—

- Meaning of in credit indemnity bond, 95.

FAILURE OF CONSIDERATION—

- For guarantor's contract, 19.

FEDERAL RULE—

- As to notice of acceptance of guaranty, 38.

FELONY—

- Personal appearance necessary to exonerate bail for, 304.

FIDELITY BOND (see Surety Bonds)—

- Concealment of principal's default under, 207, 208.
- Special stipulations in for supervision of risk, 208.
- Obligee not bound to exercise supervision over employee under in absence of express contract or fraud, 224.
- Alteration of character of employment, duties or risk, under as a discharge of, 215 et seq., 220.
- Rulings under special provision of, 220.
- Evidence against risk under in suit for reimbursement, 132.

FIDELITY INSURANCE (see Interpretation; Surety Bonds; Fidelity Bonds).

FILING—

- Official bonds, 262.

FINE—

- Imprisonment for non-payment of for violating city ordinance as discharge of surety, 190.

References are to Sections.

FIRM (see Partnership).

FISCAL OFFICER (see Official Bonds)—

Liability of sureties for loss of funds by, 268, 269.

FORBEARANCE (see Extension of Time)—

Against principal as consideration for suretyship or guaranty, 17, 18.

When express condition of liability of guarantor or surety, 19.

Voluntary, against principal, does not release surety or absolute guarantor, 224.

FORECLOSURE—

When guarantee must resort to, 27, 108.

FORECLOSURE AND SALE—

Guaranty of debt by, 27, 108.

FOREIGN ASSETS—

Liability of administration bond for, 319.

FOREIGN BANKRUPTCY—

Consent by creditor to discharge of principal in releases surety, 195.

FORFEITURE—

Release of bail from, 310.

FORGERY—

Effect of surety's signature, 48.

Effect of on surety of principal's signature, 48.

Estoppel of indorser to show, 48.

FORTHCOMING BONDS—

Nature, conditions, and breach of, 282.

"FORTHWITH"—

In stipulation for notice of default under surety bond, 187.

FRAUD—

As to competency of principal, 20.

Of creditor upon surety avoids contract, 51.

Non-disclosure as, 51.

Rule where surety inquires, 51.

What facts must be disclosed, 51.

Rule as to insolvency, 51.

Rule as to other indebtedness, 51.

Creditor must disclose secret agreement affecting character of transaction, 51.

Non-disclosure of gambling or other misconduct, 51.

Mere suspicions need not be disclosed, 51.

Rule as to principal's dishonesty in prior employment, 51.

Rule as to defaults not implying dishonesty, 51.

Knowledge by creditor essential to fraud, 51.

By principal or stranger upon surety does not release surety, 55.

Exception as to fraud in esse contractus, 55.

By obligee or creditor on principal does not usually release surety, 56.

Rule where principal elects to rescind, 56.

On co-surety a defense to contribution, 167.

In receiving sureties on official bond, 276.

Extension agreement procured by does not release surety, 233, n. 3.

Rule as to concealed under statute of limitations, 206.

Waiver of defense of under surety bond, 50.

Evidence of to show joint obligation joint and several, 199.

FRAUDS, STATUTE OF—

History, scope, and purpose of, 59.

Clause applicable to suretyships, 59.

References are to Sections.

FRAUDS, STATUTE OF—Continued.

- Construction of, 60.
- Meaning of direct, original, and collateral under, 61.
- Effect of words "no action shall be brought," 62.
- Where statute declares oral contract void, 62.
- How defense of interposed, 62 and n. 11.
- "Special promise" under, 63.
- Illustrations of, 63.
- "Debt, default or miscarriage" under, 64.
- "Of another person," meaning of, 65.
- Promise of sole debtor not within though benefit of consideration goes to another, 65.
- Whether promise direct or collateral one of intent, 65 and n. 18.
- When intent for jury, 65, n. 18.
- Promise may be deemed original where principal incompetent or not bound, 66.
- Promise for married woman of this class independent of statute, 66.
- Promise for debt of infant within statute, 66.
- Principal competent but not bound, 66.
- Joint promise of principal and surety not within, 3, 67.
- Debt or obligation novation not within, 68.
- Where principal discharged, statute does not apply, 68.
- Effect of new and independent consideration moving to guarantor, 69.
- "Main purpose rule" stated, 69.
- When question for jury under, 69, n. 35.
- Oral contract of surety company under, 70.
- Indirect, remote, or incidental benefit does not bring case within "main purpose rule," 71.
- Oral guarantee by stockholder is not within "main purpose rule," 71.
- Must consideration move from guarantee under? 72.
- Applications of "Main Purpose Rule," 73.
- Oral guarantee on sale or assignment of debts or securities valid under, 73.
- Release or transfer of lien or incumbrance on guarantor's property, 74.
- Omission to assert mechanics lien, 74.
- Williams vs. Leper, 74.
- Oral contracts of indemnity, 75.
- Promises of del credere agent, 76.
- Oral promise directly to debtor valid, 77.
- Promise to pay out of funds or property of debtor not within, 78.
- Same where guarantor indemnified, 78.
- Contracts of law merchant, 79.
- Is oral acceptance within, 79.
- Oral promise to indorse is within, 79.
- Contracts in part within, 80.
- The writing required by, 82.
- May be informal, 82.
- Oral evidence to connect several writings under, 82.
- When memorandum must be made, 83.
- Delivery unnecessary, 83.
- Must be signed, 84.
- What sufficient signing, 84.
- Same where statute says "subscribed," 84.
- Mark is sufficient under, 84.
- Initials sufficient under, 84.
- Whole contract must appear, 85.
- Parol evidence to interpret memorandum, 85.

References are to Sections.

FRAUDS, STATUTE OF—Continued.

Must memorandum express the consideration? 86.

What sufficient expression of, 86, 87.

Value received sufficient, 87.

Seal sufficient, 14.

Consideration for guarantee on commercial paper, 87.

Expression of does not supply place of if wanting, 87.

Conflict of laws as to, 88.

Surety may pay in spite of defense of and have reimbursement, 126.

Contract for extension of time if void under does not release surety, 227, 233.

FUTURE ADVANCES—

Notice of acceptance of guaranty of, 36 et seq.

Effect of death of guarantor of, 201.

Notice of revocation of guaranty of, 103, 201.

Notice of amount due under guaranty of, 42, 185.

FUTURE CREDITS—

Revocation of guaranty of by notice or death, 103.

FRAUDULENT CONVEYANCE—

Surety paying may set aside principal's, 119.

G.**GAMBLING—**

Obligee need not disclose to surety principal's during prior employment, 51.

GENERAL AGENT—

Authority of surety company's, 30.

GENERAL GUARANTY—

Defined and distinguished, 96.

Examples of, 96.

GOD, ACT OF (see Act of God).**GOOD FAITH—**

Required of creditor toward surety, 51.

Of principal no defense to action on attachment bond, 231.

GOVERNMENT—

Subrogation of surety to to priorities and preferences of, 146.

Laches not imputable to, 276.

GRANTEE (see Mortgage)—

Of mortgaged premises assuming mortgage debt, 10.

GUARANTOR (see Guaranty)—

Defined, 1, n. 1.

Not co-surety with surety co-maker, 153.

GUARANTY (see Assignment; Negotiability; Notice of Default; Notice of Acceptance; Conditional Guaranty; Absolute Guaranty; Continuing Guaranty)—

Distinguished from strict suretyship, 3.

Distinguished from indorsement, 4.

Enforceable by special assumpsit, 63.

General and special defined and distinguished, 96.

Examples of, 96.

Continuing defined and distinguished, 97.

Evidence to show intent, 97.

What deemed, 98.

Examples of, 99.

Non-continuing defined and distinguished, 97.

References are to Sections.

GUARANTY—Continued.

- Examples of non-continuing guarantees, 100.
- Revocation of continuing guarantee by notice or death, 103.
- Whether of lease or contract of employment covers renewal under option to renew, 102.
- Absolute and conditional distinguished, 105, 106.
- Guarantee of collection is conditional, 3, 105, 106.
- Of collection arising from statutory liability of stockholders, 17.
- Of payment is absolute, 105, 106.
- What constitutes due diligence under guarantee of collection, 107.
- Ordinary legal remedies must be exhausted, 107.
- Must creditor exhaust collaterals under? 103.
- Effect of insolvency of principal, 107.
- Effect of principal's non-residence, 109.
- Time and place of bringing suit, 109.
- Notice of principal's default under, 110.
- Waiver of diligence under, 111.

GUARDIAN'S BONDS—

- Nature and necessity for, 336.
- What guardians must give, 336.
- Testamentary and natural guardians, 336.
- Amount, form, and requisites of, 337.
- Conditions of, 337.
- Irregularities in, 337.
- Estoppel of sureties on, 337.
- What covered by, 338.
- Property wasted or misapplied before appointment, 338.
- General and special or sale bonds, 338.
- Foreign assets under, 338.
- Liability of sureties on for negligence of principal, 338.
- Liability on for funds deposited in guardian's name, 338.
- Additional and substituted, 339.
- Liability of old and new bond, 339.
- Contribution and exoneration between, 339.
- Joint guardians, 340.
- Of one guardian for several wards, 340.
- Where same person guardian and personal representative, 340.
- When assets of estate deemed held as guardian, 340.
- Evidence of transfer, 340.
- Adjudication against guardian conclusive on sureties, 342.
- Effect on of settlement with ward out of court, 343.
- Proof and presumptions of fraud in such settlement, 343.
- Actions on, 344.
- Statute of limitations against, 344.

GUARDIANSHIP—

- Effect of on contract of lunatics, 24.

H.

HABEAS CORPUS—

- Granting is ministerial act, 265.

HABITS—

- Of risk under surety bond need not be disclosed in absence of inquiry or warranty, 51, 52, 54.

HOLDING OVER—

- Is surety bound for tenant after? 223.
- Liability of surety for officer, 270.

HUSBAND AND WIFE (see Married Women)—

- Mortgage of wife for husband's debt, 9, 21, 173.
- Wife's suretyship for husband, 21.

References are to Sections.

I.

IGNORANCE (see Knowledge)—

- Of suretyship relation by creditor, 8, 236.
- Of principal's incapacity no defense to guarantor or surety, 20.
- Of insanity of guarantor or surety, 24.
- Of facts prevents non-disclosure from being fraudulent, 51.
- Negligence does not change rule, 51.
- By creditor of illegality of contract guaranteed, 58.
- Of paying surety that principal has defense, 123.

ILLEGALITY—

- Of principal contract taints that of guarantor or surety, 58.
- Effect of usury, 58.
- Guarantor of contract violative of police regulation not bound, 58.
- Effect where creditor ignorant of illegality, 58.
- Surety for forbidden loans bound under National Banking Law, 58.
- As a defense to suit for reimbursement, 123.
- As a defense to contribution, 167.
- Of contract to indemnify criminal bail, 311.

ILLEGAL PREFERENCE—

- Effect of payment on liability of surety where creditor compelled to return, 190.

ILLNESS—

- Of defendant as exonerating bail, 305.

"IMMEDIATELY"—

- Meaning of as to notice of default in surety bond, 187.

IMPLIED CONTRACT—

- Reimbursement of surety under, 117.
- As supporting legal action for contribution, 149.
- For contribution between parties to bills and notes, 153.

IMPLIED WAIVER—

- Of notice of acceptance of guaranty, 39.

IMPRISONMENT—

- Does principal's for debt secured discharge surety? 190.
- Of principal as exoneration of bail, 307.

IMPRISONMENT FOR DEBT—

- Abolition of exonerate civil bail, 306.

INADVERTENCE—

- Alteration by as release of surety, 210.

INCAPACITY (see Parties; Infancy; Coverture; Insanity; Corporations).**INCOMPLETE INSTRUMENT—**

- Implied authority from delivery of, 212.

INCUMBRANCE—

- Release or transfer of as taking case out of Statute of Frauds, 74.

INDEBTEDNESS—

- Creditor not bound to disclose to surety principal's on other accounts, 51.

INDEMNIFICATION—

- Of bail, 311.

INDEMNITY (see Subrogation; Reimbursement)—

- Contracts of not within Statute of Frauds, 75.
- Where guarantor holds, promise not within Statute of Frauds, 78.
- Release of securities as affecting rights of surety to, 131.
- Express contracts touching surety's, 131.

References are to Sections.

INDEMNITY—Continued.

- Contract for by surety to principal destroys right of reimbursement, 119, n. 17.
- Of co-surety who signs at another's request, 151.
- Of co-surety under express promise, 151.
- Contribution and between accommodation and other parties to bills and notes, 153.
- To surety as affecting right to contribution, 159.
- Right of surety who holds to send creditor against principal by notice, 173, n. 17.
- Equitable remedy of surety upon express contract for, 178.
- Effect of to surety where there is an unauthorized extension of time, 230.
- Right of surety to be subrogated to securities held by co-surety for, 168.

INDEMNITY BOND—

- Remedy of surety who holds, 120.
- Right of levying officer to demand, 264, n. 24.

INDORSEMENT—

- Distinguished from strict suretyship, 4.
- Distinguished from guaranty, 4.
- Anomalous or irregular, 6.
- Oral promise to make is within Statute of Frauds, 79.

INDORSER—

- Estopped to show invalidity or forgery, 4, 212.
- Liability of on non-negotiable note, 106, n. 47.
- Discharged by unauthorized extension of time, 226.

INDULGENCE—

- Mere passive to principal does not discharge surety or absolute guarantor, 224.

INFANT—

- Promise to answer for debt of within Statute of Frauds, 66.

INFANTS—

- As principals, 20.
- Sureties for are bound, 20.
- Guaranty of debt of is within Statute of Frauds, 20.
- Contracts of guaranty or suretyship by are voidable, 22.

INITIALS—

- Sufficient signing under Statute of Frauds, 84.

INJUNCTION (see Injunction Bonds)—

- Where insolvent principal sues surety before payment, 129.
- Against judgment against surety where securities released by creditor, 245.
- Against judgment against surety after judgment in favor of principal, 253.
- Not dissolved for insufficiency of bond, 298.

INJUNCTION BONDS—

- Nature and necessity for, 298.
- Insufficiency of does not justify dissolution, 298.
- Liability of sureties on, 299.
- Remedy on, 300.

INQUIRY—

- Statements made in response to under surety bond, 53.
- Non-disclosure by creditor or obligee after, 51.

INSANITY—

- Of principal no defense to surety or guarantor, 20.
- Of surety or guarantor renders contract voidable, 24.

References are to Sections.

INSANITY—Continued.

Guardianship for renders contracts void, 24.

Rule where insanity of promisor unknown to promisee, 24.

INSOLVENCY—

Creditor not bound to disclose principal's to surety, 51.

Meaning of in credit indemnity bond, 95.

Effect of principal's under guarantee of collection, 107.

Of principal under guaranty of collection, 107.

Of principal as giving surety right of retainer before payment, 136.

Effect of surety's on right to contribution, 149.

Of principal upon surety's right to have benefit of his counter-claims, 194.

Of executor or administrator indebted to estate, 318.

INSOLVENT ESTATE—

Amount for which surety paying may prove against co-surety's, 164.

INSTALLMENTS—

Subrogation of surety for one of several, 137.

Right to contribution where surety pays by, or debt is payable in, 154.

INSURANCE (see Surety Companies; Surety Bonds)—

Suretyship and, 7.

Business of surety company is in nature of, 27.

Surety bonds construed as policies of, 7, 93.

Contract, defined, 222.

Changes avoiding contract insurance bond, 222.

INSURER—

Public fiscal officer as, 268, 269.

INTENTION (see Evidence; Presumptions)—

Of wife to charge separate estate, 21.

Alteration conforming instrument to, 210, n. 6.

INTEREST (see Damages; Usury; Consideration)—

Recoverable from principal by surety who pays debt, 128.

Allowance of to surety seeking contribution, 156.

Reduction of rate of by collateral agreement does not release surety, 214.

Payment of or agreement to pay as consideration for extension of time, 234.

Usurious as consideration for extension of time, 235.

Presumption of extension of time from payment of in advance, 239.

INTERPRETATION—

Of contracts of guaranty and suretyship in general and the rule of strictissimi juris, 90.

Surety's contract not extended by implication, 90.

Rule as to commercial guarantees, 91.

When rule of contra proferentem applies, 91.

Parol evidence in aid of, 92.

Construction of surety bonds, 93.

Rule of strictissimi juris inapplicable to, 93.

Rule as to surety bonds in judicial proceedings, 93, 278.

Meaning of "Larceny and embezzlement," in surety bond, 94.

"Fraud and dishonesty" in, 94.

Non-payment of debt is not, 94.

"Negligence" under, 94.

Meaning of "insolvency," "bankruptcy," "failure," etc., in credit indemnity bonds, 95.

References are to Sections.

INTERPRETATION—Continued.

- Of guaranty as general or special, 96.
- As continuing or non-continuing, 97, 100.
- As limited or unlimited, 101.
- Of guarantee as absolute or conditional, of payment or of collection, 105, 106.
- Of conditions in bond may be controlled by recitals, 220, n. 29.
- Of attachment bond, 281.
- Of receiver's bond, 296.
- Of official bonds, 259.

IRREGULAR INDORSER (see *Anomalous Indorser*)—

- Not liable for contribution to surety maker, 153.

IRREGULAR INSTRUMENT—

- Notice of conditions from, 46.

J.

JOINT AND SEVERAL—

- Effect of death of co-promisor where contract is, 200.
- Evidence admissible to show joint contract intended to be, 199.
- Presumptions as to intention to make, 199.

JOINT DEBTOR—

- As surety for his fellows, 13.
- Payment by one who is not a surety as affecting subrogation to direct securities, 142.

JOINT DEBTORS—

- Release of one of several, 241, 242.
- Covenant not to sue one of several, 142.

JOINT GUARANTORS—

- Actions by for reimbursement, 120.

JOINT OBLIGATION—

- Effect of death of principal or surety in, 199.
- May be shown to have been made joint by mistake, 199.
- Release of co-surety in, 240.

JOINT PRINCIPAL—

- Effect of death of, 203.

JOINT PRINCIPALS—

- Actions against for reimbursement, 121.
- Action by surety for one of several, 121.

JOINT PROMISE—

- Statute of Frauds not applicable to suretyships in form of, 3, 67.
- Guarantor or surety bound by with principal not entitled to notice of acceptance, 35.
- Of principal and surety not within statute of frauds, 67.

JUDGMENT (see *Administration Bonds; Guardian's Bonds*)—

- Subrogation of surety bound in joint, 140.
- Creditor need not revive for benefit of surety, 247.
- In favor of principal as discharge of surety, 253.
- Against principal as binding on or evidence against surety, 254.
- Against principal or co-surety as evidence against surety, 255.
- In favor of surety as protection to principal, 256.
- Against official principal as evidence against his sureties, 272.
- Against surety not conclusive against risk under fidelity bond, 135.
- Against principal on attachment bond as against sureties, 281.
- Bond on appeal from void, 291.
- Decree or against receiver as evidence against his sureties, 297.

JUDGMENT LIEN—

- Subrogation of paying surety to, 143.

References are to Sections.

JUDICIAL ACT—

Defined and distinguished, 265, n. 27.

JUDICIAL BONDS—

Interpretation of, 278.

When given by surety company, 278.

JUDICIAL OFFICER—

Liability of sureties for judicial and ministerial acts of, 265.

JURISDICTION—

Concurrent, legal and equitable over contribution, 149.

Judicial acts wholly without, 265.

JURY—

When question of direct or collateral promise is for, 65, n. 18.

Question for under "main purpose rule," 69, n. 33.

K.**KNOWLEDGE (see Ignorance; Notice)—**

Of suretyship relation by creditor necessary to give suretyship rights against him, 8.

Of acceptance of guarantee equivalent to notice, 42, n. 34.

Of principal's default necessary to fraudulent concealment by creditor or obligee, 51.

By surety that principal contracted under duress, 57.

Of creditor of duress necessary to discharge of surety, by that of principal or stranger, 57.

Of surety of existence of security not necessary to his release by release of securities, 245.

Of collaterals not necessary to surety's right of subrogation, 135.

By surety of defense as affecting contribution, 155.

By creditor of securities taken by surety not material to his right of subrogation, 181.

Of death of guarantor of future advances, 201.

Essential to waiver by surety of defense of extension of time, 231.

Of suretyship by creditor essential to discharge of surety by extension of time, 236.

L.**LABORERS—**

As beneficiaries under surety bond, 115.

LACHES—

Of creditor will not alone discharge surety or absolute guarantor, 204.

Of government or its officers as defense to sureties on official bond, 276.

LANDLORD—

Subrogation of tenant's surety to lien of, 145.

LANDLORD AND TENANT (see Lease).**LAW—**

Act of as exonerating bail, 306.

LAW, ACT OF (see Act of the Law).**LAW MERCHANT (see Negotiable Instruments)—**

Are contracts of within Statute of Frauds, 79.

LEASE—

Assignment of as creating suretyship, 11.

Renewal clause in guaranteed, 102.

Death of guarantor of, 202.

Landlord not bound to resort to distress to protect absolute guarantor or surety under, 224.

References are to Sections.

LEGACIES—

Failure to pay under administration bond, 324.

LEGAL DEFENSE—

Extension of time to principal as, 225, n. 20.

LEGAL SUBROGATION—

Distinguished from conventional, 136.

LEVY (see Lien; Subrogation; Attachment; Execution)—

On personal property of principal as discharge of surety, 190.

Release of as release of surety, 250.

LIABILITY—

Covenant to save surety harmless from, 131.

LIEN—

Release or transfer of as taking oral guaranty out of Statute of Frauds, 74.

Subrogation of surety to vendor's, 144.

Subrogation of surety to of judgment, 143.

Limitation of actions applicable to proceedings to enforce, 122, 143 and n.

Subrogation of surety to corporate lien for subscriptions or debts, 145.

Subrogation to landlords, 145.

Release of by execution or attachment as release of surety, 250.

Rule where levying officer at fault, 250.

Surety bond as substitute for mechanics, 116.

LIMITATIONS, STATUTE OF—

Surety paying debt barred by as against principal may have indemnity, 124.

Rights of surety who pays after debt barred as against himself, 124.

When runs against surety's right to reimbursement, 122.

Where surety pays sealed instrument, 122, 140, 124 and n. 41.

When runs against surety's right to contribution, 154, 155, 156.

Contribution to surety who pays after running of against himself, 155.

When begins to run against surety, 204.

Rule as to fraud concealed, 206.

When begins to run against contract to indemnify or save harmless against loss or damage, 204.

May run against principal before surety, 204.

Claim barred by against principal only, enforceable against surety, 204.

Rule applied under statutes of non-claim, 204.

Does principal's waiver of defense of bind surety, 205.

Effect under of principal's fraud concealed, 206.

Discharge of surety under does not affect right of creditor in principal's securities, 183.

As to suits on guardian's bond, 344.

As to suits on administration bond, 335.

LIMITED GUARANTY (see General Guaranty)—

Nature and interpretation of, 96, 101.

LORD TENDERDEN'S ACT—

Purpose and effect of, 81.

LOSS (see Subrogation; Securities)—

Contract to indemnify surety against, 131.

When action on contract to indemnify against accrues, 204.

Of securities as affecting right to contribution, 162, 171.

Of securities as affecting liability of surety, 147, 245 et seq.

References are to Sections.

M.

MAIL—

Notice of acceptance of guaranty by, 42.

MAIN PURPOSE RULE—

Under Statute of Frauds, 69 et seq.

MAKER—

Does unauthorized extension of time discharge surety who is, 226.

MALADMINISTRATION—

As breach of administration bond, 323.

MALICE—

Absence of no defense to suit on attachment bond, 281.

MALICIOUS PROSECUTION—

Are sureties on attachment bonds liable in damages for, 279.

MARK—

Signature by satisfies Statute of Frauds, 84.

MARRIED WOMEN—

As principals, 20.

Sureties for are bound, 20.

Contracts of as guarantors or sureties void at common law, 21.

May bind separate estate in equity or under statutes, 21.

Statutory restrictions—mortgage of separate estate, 21.

Evidence of intention of to charge separate estate, 21.

MARSHALLING SECURITIES—

As against surety who claims subrogation, 134.

MATERIAL ALTERATION (see Alteration of Contract)—

Notice from fact of, 46.

As release of surety, 209 et seq.

MATERIALITY (see Warranty)—

Of facts misrepresented or concealed, 51, 52.

MATERIAL-MEN—

As beneficiaries under surety bond, 115, 116.

MECHANICS—

As beneficiaries under surety bond, 115, 116.

MECHANIC'S LIEN—

Forbearance to assert as taking oral guaranty out of Statute of Frauds, 74.

Surety bonds as substitutes for, 115, 116.

MEMORANDUM (see Frauds, Statute of)—

Under Statute of Frauds, 82 et seq.

MERCANTILE LAW AMENDMENT ACT—

Nature and provisions of, 140, n. 59.

MINISTERIAL ACT—

Defined, 265, n. 27.

Liability of sureties of judicial officer for, 265.

MISAPPROPRIATION—

Of collaterals as release of surety, 249.

MISAPPLICATION—

Of collaterals by creditor as release of surety, 249.

MISCARRIAGE—

Meaning of debt, default, or, 64.

MISCONDUCT—

Of surety as affecting contribution, 167.

MISDEMEANOR—

Is personal appearance of defendant necessary to exonerate bail for? 304.

References are to Sections.

MISREPRESENTATION (see Warranty)—

- Doctrine of as applied to surety bonds, 52.
- Positive and material avoids, 52.
- By agent or officer of obligee under surety bond, 53.
- Respecting credit, etc. of another, 81.
- As to prior defaults of public officer may defeat bond, 276.
- Of credit or ability of another—Lord Tenderden's Act, 81.

MISTAKE—

- Evidence of admissible to show joint obligation joint and several by, 199.
- Rendering principal contract void, avoids surety's, 56.

MORAL OBLIGATION—

- Supports right of subrogation, 138.

MORTGAGE—

- Of wife's property for husband's debt, 9.
- Second to creditor on same property after surety becomes bound inures to surety for first debt, 137.
- No presumption of extension agreement from taking of, 239.
- Creditor need not foreclose for benefit of surety, 247.
- Effect on surety's liability of creditor's failure to record, 248.

N.

NATIONAL BANK—

- Surety for forbidden loan by, 58.

NATURAL GUARDIAN—

- No bond required of, 336.

NE EXEAT—

- Remedy by, 312.

NE EXEAT BONDS—

- Nature and conditions, 312.

NEGLIGENCE—

- Of obligee in discovering principal's defaults, 51.
- Of obligee in responding to inquiry by surety company, 52.
- Meaning of in surety bond, 94.
- Effect of in drawing negotiable instrument upon liability of signer in cases of subsequent alteration, 212.
- Of creditor in pursuing principal no discharge of surety or absolute guarantor, 224.
- Of creditor in failing to record mortgage as release of surety, 248.
- Of holder of commercial paper as collateral as release of surety, 249, n. 30.
- As breach of administration bond, 323.

NEGOTIABLE INSTRUMENTS (see Bills and Notes; Accommodation Paper; Indorser; Maker; Acceptance of Bills; Drawer)—

- Must guarantee on express consideration, 87.
- Accommodation parties to as sureties, 4.
- Liability of indorsers on, 4.
- Contribution and indemnity between parties to, 153.
- Contribution to surety who pays by his own, 156.
- Effect of material alteration of, 212.
- Rule as to surety or guarantor under Negotiable Instruments Law, 212.
- Discharge of surety acceptor, maker or co-maker by extension of time to principal on, 226.
- Subrogation of successive parties to under joint judgment on, 140.
- Negligent release of parties to as affecting right of reimbursement, 249, n. 30.

References are to Sections.

NEGOTIABLE INSTRUMENTS LAW—

Rights of accommodation maker or acceptor as surety under, 226.

Anomalous indorser under, 6.

Effect of material alteration under, 212.

NEW BOND—

By public officer, 277.

NEW PROMISE—

By guarantor after release by want of due notice, 43.

By surety as waiver of discharge by extension of time, 231.

NON-CLAIM, STATUTES OF—

As affecting surety, 204.

NON-CONTINUING GUARANTY—

Defined and distinguished, 97.

What deemed, 100.

Examples of, 100.

NON-DISCLOSURE (see Concealment).

NON HOEC IN FOEDERA VENI—

Maxim applied to unauthorized extension of time, 225.

Maxim applied to material changes and alterations releasing surety, 209.

NON-NEGOTIABLE INSTRUMENT—

Liability of Indorser of, 106, n. 47.

NON-RESIDENCE (see Absence)—

Effect of principal's under guaranty of collection, 109.

Effect of surety's on right of contribution, 149.

Estoppel of sureties on official bond to show, 262.

NOTICE (see Notice of Acceptance; Notice of Default)—

Revocation of continuing guaranty by, 103, 201, 202.

Revocation of surety bond by, 104.

Of principal's default under guaranty of collection, 110.

None necessary before suit for contribution, 154.

Right of surety who is indemnified to send creditor against principal by, 173, n. 17.

Right of surety to compel creditor by to sue principal—rule of *Pain v. Packard*, 172.

Not recognized in most states, 172.

Distinguished from equitable rule, 172.

Statutory notice to sue, 173.

Sufficiency of notice to sue, 174.

Waiver and withdrawal of, 175.

Of death of guarantor under guarantee of future advances, 201.

NOTICE OF ACCEPTANCE OF GUARANTY—

In general, 31.

Distinct from notice of default, 31.

Not necessary when guarantor signs as principal's request, 32.

Unless he has expressly stipulated for it, 32.

Valuable consideration moving to guarantor from creditor dispenses with, 33.

Same where it is stipulated for, 33.

Contemporaneous guaranty binding without, 34.

None necessary where guaranty by specialty, 35.

Unnecessary where promise of principal and guarantor joint, 35.

Of future advances—problem stated, 36.

Same—The English rule, 37.

Rule as to expression of mere willingness to guarantee, 37.

Same—Rule in New York, Ohio and Nebraska, 37.

Federal or American rule requires notice, 38.

The rule of *Bishop v. Eaton*, 38.

References are to Sections.

NOTICE OF ACCEPTANCE OF GUARANTY—Continued.

- Rules where guaranty absolute, 39.
- Waiver of notice implied, 39.
- Express waiver effectual, 39.
- From fact that guaranty is by stockholders generally, 39, n. 28.
- Stipulations for, 40.
- Form and sufficiency of, 42.
- By mail, 42.
- Knowledge equivalent to, 42, n. 34.
- Waiver of, 43 and n. 39.

NOTICE OF DEFAULT—

- Surety not entitled to, 3, 184.
- Of principal's default under absolute guarantee unnecessary under majority rule, 184.
- The minority rule as to under guaranty, 185.
- Rule where guaranty uncertain as to time or amount, 185.
- Time and sufficiency of, 186.
- Pleading, 186.
- No release by want of unless injury shown, 186.
- Rule as to indorsers contrasted, 186.
- Waiver of, 186.
- Express stipulations for, 187.
- Same in fidelity and guaranty bonds, 187, 207, 208.
- How stipulations for construed, 187.
- Construction of particular provisions as to, 187.
- "Immediately" "forthwith," etc. requires reasonably prompt, 187.
- When deemed a condition precedent, 187.
- Damage immaterial, 187.
- Stipulations for bind laborers and material-men, 187.
- Provisions for in surety bond may be waived, 188.
- Effect of waiver of on right of company to indemnity from risk, 188.
- Not waived by waiver of notice of acceptance, 43, n. 39.

NOVATION—

- Nature of, 68.
- Promise of new debtor after not within Statute of Frauds, 68.
- Of partnership debt, 8, n. 42.

O.

OFFER AND ACCEPTANCE (see Notice of Acceptance of Guaranty)—

- Essential to guaranty, 31 et seq.

OFFICE—

- Change of character or duties of as discharge of surety, 274, 215, 216 et seq.

OFFICER (see Public Officer; Official Bonds)—

- Representations by as basis for surety bond to corporation, 53.
- Creditor cannot plead negligence of levying as against surety, 250.
- Right of levying to demand indemnity bond, 264, n. 24.

OFFICER DE FACTO—

- Bond of valid, 260.

OFFICIAL ACTS (see Official Bonds)—

- What deemed, 264.

OFFICIAL BONDS—

- Of whom required, 258.
- Object of, 258.
- Construction of, 259.

References are to Sections.

OFFICIAL BONDS—Continued.

- Same—where given by surety company, 259.
- Of de facto officer valid, 260.
- Estoppel of sureties on, 260.
- Failure of sureties named in bond to execute, 45.
- How far liability of sureties dependent on form of, 261.
- Substantial compliance with statutory requirements usually sufficient, 261.
- Validity of as common law obligation, 261.
- Statutes requiring to be filed or approved, 262.
- Estoppel of sureties on to show non-residence, 262.
- Voluntary bonds, 263.
- Consideration for voluntary, 263.
- Exaction of excessive penalties in, 263.
- Cover official acts only, 264.
- What acts deemed official, 264.
- Distinction between acts by virtue of office and under color of office, 264.
- Liability of for judicial and ministerial acts, 265.
- Acts wholly without jurisdiction, 265.
- Sureties liable for defaults only in office for which bond given, 266.
- Sureties on liable for defaults of deputies, 267.
- Sureties on subrogated to rights of principal against bond of defaulting deputy, 267.
- Liability of principal and sureties on for loss of public funds, 268, 269.
- Time of default for which sureties on liable, 270.
- Successive terms—re-election, 270.
- Evidence and presumptions as to time of default, 270.
- Competency of principal's statements and accounts as against sureties on, 271.
- How far judgment admissible against or concludes sureties on, 272.
- Alteration of as discharge of surety, 273.
- Change of official duties under, 274.
- Extension of time for accounting under, 275.
- Concealment of or misrepresentation as to prior defaults under, 276.
- Failure to give notice of subsequent defaults—laches, 276.
- Effect of giving new as to subsequent defaults, 277.

OMISSION—

- Of signature of principal or co-surety named in body of instrument, 45.

"ORIGINAL"—

- Meaning of term as used in cases under Statute of Frauds, 61, 65 and n. 18.

P.

PAIN V. PACKARD—

- Rule of, 172, 176.

PARDON—

- As exoneration of bail, 307.

PAROL EVIDENCE (see Evidence; Frauds, Statute of)—

- Admissible to show suretyship, 2, 150.
- To show order in which parties to commercial paper liable inter se, 150.
- As to intention of parties under anomalous indorsement, 6.
- To show wife's suretyship against bona fide purchaser of husband's note, 21, n. 16.

References are to Sections.

PAROL EVIDENCE—Continued.

To connect several writings under Statute of Frauds, 82.

In aid of memorandum under Statute of Frauds, 85.

That surety was not to be held, 252.

PARTIES—

Change of as affecting liability of surety, 198, 202, 203.

PARTIES TO ACTIONS—

For reimbursement, 120, 121.

For contribution, 149, 120, n. 18.

By surety to compel exoneration by principal, 177.

PARTNER (see **Partnership**)—

Promise by to co-partner to pay firm debt not within Statute of Frauds, 77, n. 51.

Bail for one cannot have indemnity of other, 121.

PARTNERS—

May bind themselves as sureties or guarantors, 29.

Are bound individually by signing firm name without authority, 29.

Retiring cannot by notice send creditor against co-partners assuming firm debts, 173, n. 17.

PARTNERSHIP—

Assumption of debts of by one or more members as establishing suretyship relation, 8.

Partner usually has no implied power to bind as surety, 29.

Or by issue of accommodation paper, 29.

Extension of time after assumption of debts of, 236.

Treated as one surety in contribution, 156.

Change in membership as affecting liability of sureties to or for the firm, 198, 203.

PART PAYMENT—

Does not give right of subrogation, 136.

As a waiver of notice of acceptance or default under guaranty, 43.

By surety as waiver of release by extension of time, 231.

PAST CONSIDERATION—

Will not support guaranty, 16.

PAYMENT (see **Application of Payments; Banks**)—

Guaranty of, 3, 105, 106.

By surety must precede suit for indemnity, 122.

By express contract, 131.

What constitutes by surety, 130.

Under right of reimbursement, 130.

By surety's bill, note or bond, 130.

By obligation of stranger, 130.

Essential to subrogation, 136.

What sufficient to entitle to subrogation, 136.

Must be compulsory to give contribution, 154.

Amount of necessary to give contribution, 154.

By installments or where debt payable in as giving contribution, 154.

By surety with knowledge of principal's release defeats contribution, 161.

Remedies of surety in equity before, 176, 177.

Exoneration by co-surety before, 180.

By principal discharges surety, 190.

Rule where illegal preference returned, 190.

Imprisonment of principal as, 190.

Application of, 191, 270.

When will be made in relief of surety, 191.

Application by creditor of principal's funds or property, 191.

References are to Sections.

PAYMENT—Continued.

- Conflicting rules as to bank deposits, 191.
- Of installments before due as discharge of surety on contract bond, 222.
- By surety in ignorance of release of securities may be recovered, 245.
- Estoppel of creditor as against surety by representations as, 252.
- Application of money received by officer in one term to defaults in prior term, 270.

PENALTIES—

- Excessive exacted in official bond, 263.
- Of bond is limit of liability, 156.
- Contribution between several bonds, each with different, 156.
- Of appeal bonds maximum of liability, 289.

PENCIL—

- Alteration of negotiable instrument written in, 212.

PERFORMANCE—

- Guaranty of, 105, 106.

PERSONAL DEFENSES—

- Of principal not available to surety, 20.

PERSONAL INDEMNITY—

- Rights of creditor in securities given to surety for his, 181, 182, 183.

PERSONAL REPRESENTATIVES (see Executors and Administrators; Death).**PERSONAL SERVICE—**

- Change or alteration of contract for as discharge of surety, 215, 216.

PLACE, LAW OF (see Conflict of Laws).**PLEADING—**

- Notice of acceptance or default under guaranty, 42.
- Defense of Statute of Frauds, 62 and n. 11.
- Extension of time as release of surety, 238.

PLEDGE—

- Oral for debt of another good under Statute of Frauds, 1, n. 3.
- Of property for debt of another establishes suretyship relation, 9.
- Of wife's property for husband's debt, 9.

POLICY OF INSURANCE (see Surety Bonds)—

- Corporate surety bond in the nature of, 93.

PREFERENCE—

- Creditor compelled to return illegal may still hold surety, 190.
- Subrogation of creditor to surety's, 146.

PREMIUM—

- Often paid by risk in guarantee insurance, 72.

PRESUMPTION—

- Of order in which successive indorsers are liable, 4.
- That joint obligation meant to be joint and several, 199.
- Of extension agreement from receipt of interest in advance, 239.
- From taking principal's bill or note, 239, 17, n. 15.
- From taking collateral securities, 239.
- Arising from failure of principal or co-surety named in instrument to execute it, 45.
- As to time of default by official principal, 270.
- Of fraud in settlement with ward out of court, 343.

References are to Sections.

PRINCIPAL—

Defined, 1.

Incapacity of in general, 20.

Ultra vires contract of corporate, 25.

PRIVATE CORPORATIONS—

As guarantors or sureties, 26.

PRIORITIES—

Subrogation of surety to creditor's, 146.

PROMISSORY NOTE—

Right of surety paying debt with his own, 130.

PROMISSORY WARRANTY—

Waiver and estoppel as to surety bond, 50.

PROOFS OF LOSS—

Under surety bonds, 187, 188.

Waiver of, 188.

Effect of waiver of on right of company to indemnity from principal, 189.

PROPERTY—

Payment in by surety seeking reimbursement, 127.

PUBLIC ADMINISTRATOR—

Bond of, 314, n. 16.

PUBLIC ENEMY—

Act of as excuse for loss of public funds, 268, 269, n. 48.

PUBLIC MONEYS—

Liability for loss of, 268.

PUBLIC OFFICERS (see Official Bonds)—

Concealments of defaults of, 52, 276.

Who are, 258 and n.

Bonds of, in general, 258.

PUNITORY DAMAGES—

In actions on attachment bonds, 279.

PURCHASE MONEY LIEN—

Subrogation of paying surety to, 144.

Q.

QUIA TIMET (see Equity; Exoneration)—

Right of surety to sue in equity to compel principal to pay or surety to sue principal, 176, 177.

Relief of surety against co-surety, 180.

R.

RAILROAD COMPANY—

When guarantee by is ultra vires, 26.

RATIFICATION—

Of contract of guaranty or suretyship by co-partner, 29.

By surety of altered contract, 211.

REAL ESTATE—

Liability of general and special bond of administrator or executor on sale of, 326.

Same as to guardians, 338.

REAL SURETYSHIP—

By mortgage or pledge for another's debt, 9.

By wife's mortgage for husband's debt, 9.

References are to Sections.

REASONABLE TIME—

Forbearance against principal for as consideration for guaranty, 17.

RECEIVER (see Receiver's Bonds)—

Defined, 295.

RECEIVER'S BONDS—

Nature and purpose of, 295.

Practice in requiring, 295.

Interpretation of, 295.

Liability of sureties on, 296.

What constitutes breach of, 296.

How far judgment or decree against principal on binds sureties, 297.

Indemnity of sureties on, 297.

RECITALS—

Estoppel of sureties by recitals in bond, 49.

In bond of surety may control conditions, 220, n. 29.

RECOGNIZANCE—

Distinguished from bail bond, 303.

REDELIVERY BONDS—

Nature, form, conditions and breach of, 282.

REDUCTION—

Of amount principal is to pay does not release surety, 213, 209, n. 3.

REIMBURSEMENT (see Indemnity; Subrogation; Contribution)—

Surety's right or equity to from principal, 1, 4, 117.

Originally enforceable in equity, 117.

Now enforceable at law, 117.

Basis of right to at law, 117.

Right as the basis of definition of surety, 117.

Surety claiming must sign at principal's request, 118.

Request may be implied, 118.

Is implied in case of indorser, 118.

Right to arises only upon payment, 119.

No right to by surety who has agreed to indemnify principal against obligation, 119, n. 17.

When surety may have fraudulent conveyances of principal set aside, by virtue of right to, 119.

Is subject to express contract, 119, 131.

Parties to actions for, 120, 121.

Of surety for one of several joint principals, 121.

When right of action for accrues, 122.

Effect of payment before maturity, 122.

Demand and notice unnecessary before suit for, 122, n. 26.

Surety may pay by installments, 122.

When statute of limitations runs against right to, 122, 140.

Payment in spite of principal's defenses, 123.

Bankruptcy of principal as affecting right of, 196.

Payment after statute of limitations has run against principal gives right to, 124.

Otherwise where statute has run against surety, 124.

Failure of surety to interpose his own defenses as bar to, 126.

May waive demand and notice, 126.

Rule as to accommodation drawer, 126.

Amount recoverable under right to, 127.

Is confined to fair indemnity, 127.

Rule where surety takes assignment, 127.

Interest recoverable under right to, 128.

When costs and damages recoverable under right to, 128.

References are to Sections.

REIMBURSEMENT—Continued.

- Remote and consequential damages under right to, 128.
- Set-off as affecting right to, 129.
- What constitutes payment giving right to, 130.
- Payment by surety's own bill, note or bond, 130.
- Rule where surety pays with obligation of stranger, 130.
- Express contracts touching, 131.
- When surety may recover under before payment, 131.
- Evidence against risk in suits for under fidelity bond, 132.
- Effect on right of surety company to of waiver of notice and proofs of loss, 189.
- Of sureties on receiver's bond, 297.
- Civil bail may claim, 311.
- Criminal bail cannot enforce, 311.
- Rulings where cash bail authorized, 311.

RELEASE—

- Surety paying after principal's, 123.
- Of securities by principal as release of surety, 147, 245 et seq.
- Of principal or co-surety as affecting right to contribution, 161.
- Payment by surety with knowledge of principal's, 161.
- Or loss of securities as affecting contribution, 162, 171.
- By surety of securities held by surety of principal as affecting rights of creditor thereto, 182.
- Of surety as affecting right of creditor to debtor's securities held by surety, 183.
- Of principal releases surety unless rights reserved, 228, 240, 242.
- O prior party to commercial paper as release of subsequent, 244.
- Of securities held by creditor from co-surety, 251.

RELEASE OF SECURITIES (see Securities; Release).**REMEDIES (see Equity; Exoneration)—**

- Legal and equitable for contribution contrasted, 149.
- For wrongful attachment, 279.

REMEDY—

- To enforce subrogation, 143.
- Of surety in equity to compel creditor to sue principal, 176.
- On appeal bonds, 294.
- On injunction bond, 300.

REMOTE DAMAGES—

- Surety cannot recover of principal, 128.

REMOVAL—

- Of principal on administration bond, 330.

RENEWAL—

- Clause for in guarantee or contract secured, 102.
- Effect of, of lease on liability of surety, 223.

RENT—

- Reduction in amount of as discharge of surety, 214.
- Liability of surety for after renewal or holding over, 223.

REPLEVIN (see Replevin Bonds)—

- Nature of remedy by, 284.
- Nature, purpose and necessity of bond in, 284.

REPLEVIN BONDS—

- Nature, purpose and necessity of, 284.
- Form and conditions of, 285.
- Breach of, 286.
- Effect of dismissal of action as, 286.
- Abatement of action as breach of, 286.
- Effect of adjudication against principal on, 287.
- Damages on, 288.

References are to Sections.

REPRESENTATION—

By creditor to surety that debt is paid as creating estoppel, 252.

REPRESENTATIONS (see Fraud; Concealment; Misrepresentation; Admissions)—

Authority of agent to bind obligee by under surety bond, 53.

REQUEST—

Guarantor who signs at creditor's not entitled to notice of acceptance, 32.

Subrogation of surety signing without principal's, 139.

Is surety who signs at another's liable to latter for contribution, 151.

RESCISSION—

By infant principal as affecting liability of guarantor or surety, 20.

By principal for creditor's fraud, 57.

By principal for duress by creditor, 58.

RESERVATION OF RIGHTS—

Against surety prevents his discharge by unauthorized extension of time to principal, 225, 228, 229.

How made, 229, 243.

Prevents release of surety by release of principal, extension of time, or covenant not to sue, 242.

How must be made, 243.

RES GESTAE—

Statements and admissions of principal as, 257.

RESIGNATION—

Of principal on administration bond, 330.

RETAINER—

Right of surety where principal insolvent, 136.

RETIRING PARTNER—

As surety where remaining partners assume firm debts, 8.

REVOCATION—

Of continuing guaranty by notice or death, 103.

Of surety bond by notice, 104.

8.

SALARY—

Change in amount, or time, or mode of payment, of principal's as discharge of fidelity bond, 219.

SALE—

Oral guaranty in of securities valid, 73.

SALE BOND—

Liability of and general bond of executor or administrator, 326.

Same, of guardian, 338.

SATISFACTION (see Payment; Tender; Bank)—

By principal as release of surety, 190 et seq.

SEAL (see Specialty; Bond)—

Sufficient expression of consideration under Statute of Frauds, 87.

SECOND MORTGAGE—

Subrogation as against creditor taking after surety bound for debt secured by first, 137.

SECURITIES—

Oral guaranty in sale or assignment of, 73.

Release, surrender, or impairment of by principal as release of surety, 147, 245 et seq.

Expense of preserving or enforcing as an element in contribution, 156.

References are to Sections.

SECURITIES—Continued.

- Release or loss of as affecting contribution, 162, 171.
- Surety cannot compel creditor to resort to principal's in the first instance, 179.
- Rule in cases of insolvency of principal or other equitable circumstances, 179.
- Rule where property of principal and surety pledged or mortgaged for the debt, 179.
- Subrogation of creditor to surety's, 181.
- Creditor's neglect to enforce does not release surety or absolute guarantor, 224.
- Creditor not bound to take additional for protection of surety or guarantor, 224.
- No presumption of extension of time to principal from receipt of purely collateral, 239.
- Surety released by release of principal's by creditor, 245.
- Knowledge of securities by surety not essential to his discharge, 245.
- Surety released by release of though not taken until after he was bound, 245.
- Surety not discharged where he consents to release of, 245.
- Enjoining collection of judgment against surety after release of, 245.
- Surety paying in ignorance of release of may recover back, 245.
- Release of releases surety only pro tanto, 246.
- Burden of showing value of, 246.
- When release of constitutes material change in contract releasing surety absolutely, 246.
- Exchange of does not release sureties, 246.
- Creditor need not seek or actively enforce, 247.
- Creditor need not foreclose, 247.
- Creditor need not revive judgment, 247.
- Creditor need not levy execution, 247.
- Effect on surety's liability of creditor's failure to record mortgage, 248.
- Surety not released where securities discharged or lost are worthless, 249.
- Rule where surety holds prior lien or mortgage, 249.
- Waste, or misapplication, or misappropriation of as release of surety, 249.
- Release of obtained by legal process, 249.
- Release by creditor of lien obtained by legal process, 250.

SEPARATE ESTATE—

- Power of married women to bind as guarantors or sureties, 21.
- Mortgage of married woman's for husband's debt, 921.

SET-OFF (see Set-off and Counterclaim)—

- As affecting surety's right to reimbursement, 129.
- In actions for contribution, 166.

SET-OFF AND COUNTERCLAIM—

- Surety may have benefit of principal's against creditor where pleaded and proved by principal, 194.
- Same where principal consents or assigns to surety, 194.
- Not pleadable by surety sued alone unless principal consents or assigns, 194.
- Rule as to breach of warranty, 194.
- Rule as to matter constituting failure of consideration, 194.
- Rule as to where principal insolvent, 194.

SEVERAL OBLIGATION—

- Effect of release of one surety in, 240, 241.

References are to Sections.

SHERIFF—

Act of in releasing levy imputable to creditor, 250.

Liability of sureties of for wrongful levy, 264.

Bail may command services of, 302.

SIGNATURE—

Absence of that of principal or co-surety named in body of contract, 45.

What sufficient under Statute of Frauds, 84.

Same where statute requires memorandum to be subscribed, 84.

SOLVENCY—

Oral representations as to of another, 81.

SPECIAL ASSUMPSIT—

Is remedy on collateral guaranty, 63.

SPECIAL BOND (see Sale Bond).**SPECIAL GUARANTY—**

Defined and distinguished, 96.

Examples of, 96.

"SPECIAL PROMISE"—

Meaning of in Statute of Frauds, 63.

SPECIALTY—

Suretyship by, 14.

No consideration necessary where suretyship is by at common law, 14.

None need be expressed in guaranty by under Statute of Frauds, 14.

Rule under statutes, 14.

Notice of acceptance of guaranty by unnecessary, 32.

Limitation of actions for reimbursement after payment of by surety, 124 and n. 41.

Subrogation of surety in joint, 140.

Does parol extension discharge surety on? 237.

SPECULATING—

Knowledge that risk has been under warranty in surety bond, 54.

SPECULATION—

Non-disclosure by creditor of principal's, 51.

SPOLIATION—

Distinguished from alteration of instrument, 210.

SUBSEQUENT GUARANTY—

Needs new consideration, 16.

STATE—

Subrogation of surety to priorities of, 146.

STATEMENTS (see Accounts, Admissions)—

Rendered by principal in course of employment as evidence against surety, 257.

STATUTES—

Enter into construction of official bonds, 259.

STAY BOND—

Contribution and indemnity of sureties on of prior sureties, 152.

STAY OF PROCEEDINGS—

Where insolvent principal sues surety before payment, 129.

Contribution and indemnity between sureties to secure and prior sureties, 152.

STOCKHOLDER—

Oral guarantee of corporate debt is within Statute of Frauds, 71.

Indorsement of corporate paper by married woman, 21.

References are to Sections.

STOCKHOLDERS—

As sureties respecting statutory liability, 12.

Guaranty by generally of corporate debts requires no notice of acceptance, 39, n. 28.

STRANGER (see Volunteers; Subrogation; Beneficiaries)—

Material alteration by does not release surety, 210.

Rights of to consideration under surety bonds, 115, 116.

STRICTISSIMI JURIS—

The rule or principle of, 90, 91, 93.

Inapplicable to corporate surety bonds, 93, 259.

Rule of applied to material changes and alterations, 209.

Doctrine of applies to official bonds, 259.

SUBROGATION (see Securities; Release)—

Definition, nature, and origin of right of, 133.

Under corporate surety bond, 133.

Who entitled to, 133.

Of insurer, 7.

Administered on equitable principles, 134.

Is for indemnity merely, 134.

Will not be enforced as against bona fide purchasers, 134.

Must yield to prior equities, 134.

Not allowed to mere volunteer, 134.

Is subject to doctrine of marshalling, 134.

Enforced against purchasers and encumbrancers with notice, 135.

Knowledge of surety not essential to, 135.

Extends to after-acquired securities, 135.

Arises only after payment in full, 136.

Rule where security taken by surety for other debts than that secured, 136.

Rule where surety owes principal, 136.

What constitutes payment giving rise to, 136.

Of surety for one of several debts or installments, 137.

To mortgage where second mortgage given creditor on same property for new debt, 137.

Rights of successive sureties in such cases, 137.

Payment to give rise to must be compulsory, 138.

When deemed compulsory—volunteers, 138.

Who deemed volunteer, 138.

Effect of assignment to stranger paying, 138.

Payment at debtor's request not voluntary, 138.

Moral obligation to pay supports right of, 138.

Right of where surety signs without request, 139.

Rule as to surety companies, 139.

Under specialty binding principal and surety jointly, 140.

Under judgment against principal and surety jointly, 140.

To securities purely collateral, 140.

Under joint and several obligation, 140.

Under joint judgment on commercial paper, 140.

Other direct securities paid by surety co-promisor, 141.

Rule as to where payment by joint debtor not a surety, 142.

Effect of the Mercantile Law Amendment Act on right of to direct securities, 141.

Of surety to judgment lien as against principal, 143.

Limitation of actions to enforce lien, 143 and n.

Remedy to enforce, 143.

Subrogation to lien for purchase money, 144.

Of surety to corporate lien for subscriptions or debts, 145.

Of surety to agricultural lien, 145.

References are to Sections.

SUBROGATION—Continued.

- Of surety to rights against third persons participating in principal's breach of trust, 145.
- Of surety to priorities of principal, 145.
- Effect of impairment of right of by loss or surrender of securities, 147, 245 et seq.
- Assignment of surety's right of, 148.
- Of sureties generally to indemnity held by co-sureties, 168.
- Rule where securities given or payments made to surety after payment by him, 168.
- Applies only as between co-sureties, 168.
- Co-sureties entitled to share securities proportionately, 168.
- Of surety to creditor's rights against co-surety, 169.
- Rights of co-surety in joint judgments and specialties, 169.
- Surety subrogated to right of creditor to prove for full amount against insolvent co-surety, 170.
- Duty of surety to preserve and apply securities so that co-sureties may enjoy, 171.
- Creditor entitled to in securities held by co-surety, 181.
- Limitations upon the rule, 181.
- Effect of release of securities by surety upon creditor's rights to, 182.
- Effect of release of surety upon creditor's rights in, 183.
- Of surety to right of creditor to prove against principal in bankruptcy, 196.
- Of sureties on official bond against sureties of defaulting deputy, 267.
- Effect of impairment of right of by release of securities, 245.
- Of sureties on prior appeal bond to rights against sureties on later, 293.
- Of bail, 311.
- Limitation applicable to actions for, 125 and n. 41.

"SUBSCRIBED"—

- Meaning of in Statute of Frauds, 84.

SUBSTANTIAL AFFIRMANCE—

- Necessary to breach of appeal bond, 292.

SUBSTITUTED BONDS—

- Of executor or administrator, 327.
- How far cumulative, 327.
- Exoneration and contribution between, 327.

SUCCESSIVE BONDS—

- Liability of sureties on of executor or administrator, 327.
- When cumulative, 327.
- Exoneration and contribution between, 327.

SUCCESSIVE SURETIES—

- For successive debts secured by mortgages on same property, 137.

SUNDAY—

- Surety on contract made on not bound, 58.
- Contract of surety or guarantor entered into on void, 58.
- Bail may arrest principal on, 302.

SUNDAY CONTRACT (see Illegality).**SUPERSEDEAS BONDS (see Appeal Bonds)—**

- Damages on, 294.

SUPERVISION—

- Of bonded employes not necessary to liability of surety, 224.
- Special terms in fidelity bonds as to of risk, 208.

References are to Sections.

SURETY (see Infancy; Insanity; Married Women; Husband and Wife; Corporations; Partnership)—

- Defined, 1, 3.
- Distinguished from guarantor, 3.
- When word creates suretyship, 3, n. 8.
- Not released by want of diligence against principal, 3.
- Accommodation party as, 5.
- Anomalous indorser as, 6.
- Incapacity of, 21 et seq.
- Liability of measured by that of principal, 89.
- On note not co-surety with guarantor, 153.

SURETY BONDS (see Notice of Default; Proofs of Loss; Bonds; Surety Companies; Insurance)—

- Fraud in, 52.
- How construed, 93, 259.
- Special terms descriptive of risk in, 94.
- Assignment of, 114.
- As substitute for mechanics lien, 116.
- Subrogation under, 133.
- Provisions in for notice and proofs of default, 187 et seq.
- Stipulations in as to supervision of risk, 208.
- Waiver and estoppel as applied to bonds of, 50.
- Alteration of principal's employment or duty as affecting, 220.
- Alteration of building contract as affecting, 221, 222.

SURETY COMPANIES—

- Nature of, 7.
- Bonds of in the nature of insurance policies, 7.
- When general insurance statutes applicable to, 7.
- Are oral contracts of within Statute of Frauds? 70.
- Implied authority of general agent of, 30.
- Entitled to contribution as against non-compensated surety, 150, n. 19.
- Subrogation of where bond signed without principal's request, 139.

SURETYSHIP—

- Defined, 1, 3.
- Real and personal distinguished, 1.
- Relation may be shown by parol, 2.
- Distinguished from guaranty, 3.
- Is a direct and primary undertaking, 3.
- By assumption of firm debts, 8.
- When knowledge of by creditor essential to give full suretyship rights, 8.
- By mortgage or pledge for another's debt, 9.
- By wife's mortgage for husband's debt, 9.
- By assumption of mortgage debt, 10.
- By assignment of lease, 11.
- With respect to stockholders statutory liability, 12.
- As between co-debtors, 13.
- By specialty, 14.

SURRENDER—

- Of securities by principal as discharge of surety, 147, 245 et seq.
- Of evidence of debt as creating estoppel against creditor, 252.
- Of principal as exoneration of bail, 304.

T.

TENDER—

- Valid by principal or surety releases surety, 192.
- Need not be kept good to release surety, 192.
- Must be kept good to affect interest and costs in favor of principal, 192.

References are to Sections.

TERM—

Sureties on official bond for particular, 270.

TESTAMENTARY GUARDIAN—

When must give bond, 336.

TICKET AGENT—

Sureties for not released by extension of railway's connections, 217.

TIME (see Extension of Time)—

When memorandum must be made to satisfy Statute of Frauds, 83.

Of giving notice of default under surety bond, 187.

Change of in paying compensation of bonded officer or employee, 219.

Change in for accounting by officer or employee, 218.

Unauthorized extension of as discharge of surety, 225 et seq.

Extension of to principal must be for definite to release surety, 232.

What deemed definite extension of, 232.

Of default by public officer, 270.

Presumptions and proof as to, 270.

TIME, LAPSE OF (see Limitations, Statute of).

TORT—

Contract to answer for another's must be in writing, 64.

TREASURER—

Subrogation of surety for to priorities of state, 146, n.

TRUST, BREACH OF—

Subrogation of surety to rights of obligee as against stranger participating in principal's, 145.

TRUSTEE—

When principal deemed for surety, 119.

Surety as of securities for co-sureties, 168, 171.

U.

UBERRIMAE FIDEI—

Contract of surety is not, 51.

ULTRA VIRES (see Corporations; Surety Companies)—

Doctrine of as applied to contract of guaranty and suretyship, 25, 26, 27.

UNAUTHORIZED ALTERATION (see Alteration of Contract)—

Of contract as discharge of surety, 209 et seq.

UNAUTHORIZED EXTENSION OF TIME (see Extension of Time)—

To principal as discharge of surety, 225 et seq.

UNCONDITIONAL GUARANTY (see Absolute Guaranty).

UNLIMITED GUARANTY—

Nature and effect, 98, 101.

USURIOUS INTEREST (see Usury).

USURY—

Payment of or promise to pay as consideration for extension of time, 235.

Is defense to surety when defense to principal, 58.

V.

VALUE RECEIVED—

Sufficient expression of consideration under Statute of Frauds, 87.

VARIATION (see Alteration of Contract)—

Of principal's contract as a discharge of surety, 209 et seq.

References are to Sections.

- VENDOR'S LIEN**—
 Subrogation of surety to, 144.
- VERBAL CONTRACT**—
 Of surety company under Statute of Frauds, 70.
- VIRTUE OF OFFICE**—
 Acts by, 264.
- VOID**—
 Effect of word in Statute of Frauds, 62.
 Contract for extension of time does not release surety, 227.
- VOID JUDGMENT**—
 Bond on appeal from, 291.
- VOLUNTARY BOND**—
 Of public officer, 263.
- VOLUNTARY FORBEARANCE**—
 As a consideration, 17, 18.
 Of creditor no discharge of surety or absolute guarantor, 224.
- VOLUNTEER**—
 Not entitled to subrogation, 134, 136, 138.
 Who deemed to be, 138.
 Not entitled to contribution, 155.
 Surety company waiving notice and proofs of loss as, 189.
- VOUCHER**—
 Of payment as evidence against risk under fidelity bond, 132.
- ULTRA VIRES** (see Corporation).

W.

- WAIN V. WARLTERS**—
 Rule in, 86.
- WAIVER** (see Guardian's Bonds)—
 Implied of notice of acceptance of guaranty, 39, 43.
 Express waiver effectual, 39, 43.
 Construction of waivers, 43.
 Doctrine of applied to corporate surety bonds, 50.
 Of warranty in application by conditions of surety bond, 53.
 Of diligence under guaranty of collection, 111.
 Of want of demand and notice by guarantor does not affect right to reimbursement, 126.
 Of notice to sue principal, 175.
 By creditor of right of subrogation to surety's securities, 181.
 Of notice and proofs of loss under surety bond, 188, 189.
 Of statute of limitations by principal so as to bind surety, 205.
 By surety of discharge by extension of time, 231.
 Part payment as waiver, 231.
 Of defects in appeal bonds, 290.
 Settlement with out of court, 343.
- WARRANTY**—
 Distinguished from guaranty, 3, n. 6.
 From the same root as guaranty, 3, n. 6.
 Doctrine of as applied to corporate surety bond, 53.
 What deemed in bond or application, 53.
 Materiality settled in advance by, 53.
 Waiver of in application by conditions of surety bond, 53.
 Construction of in surety bond, 54.
 That books of risk have been found correct, 54.
 That risk is not engaged in other employment, 54.

References are to Sections.

WARRANTY—Continued.

Statement that principal's accounts examined and found correct is not necessarily, 208.

Stipulation that periodic audits will be made is, 208.

Breach of promissory defensive, 208.

WASTE—

Of collaterals as release of surety, 249.

WIFE (see Husband and Wife; Married Women).**WILL—**

Bond where dispensed with by, 313.

WILLIAMS V. LEPPER—

Comments on, 74.

WITHDRAWAL—

Of notice to sue principal, 175.

WORKING CONTRACTS—

Alteration of discharging surety on, 221, 222.

WRIT—

Of ne exeat, 312.

WRIT OF ERROR—

A supersedeas at common law, 289.

WRITING (see Frauds, Statute of)—

To satisfy Statute of Frauds, 82 et seq.

WRONGFUL—

When attachment deemed within meaning of bond, 281.

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